A

LEOPAD HOLDINGS SDN BHD v. ASIAN SHIELD WAREHOUSING SDN BHD (IN LIQUIDATION)

COURT OF APPEAL, PUTRAJAYA
RAVINTHRAN PARAMAGURU JCA
HASHIM HAMZAH JCA
B LIM CHONG FONG JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-305-02-2020]
7 DECEMBER 2023

C **Abstract** – *The sanction of the Director General of Insolvency, by reason of a bankrupt's limited capacity, is not necessary in the bankrupt's acts of instructing a solicitor and bringing an action of debt recovery on behalf of a wound-up company as such acts are consistent with winding-up that does not constitute the management of the wound-up company. It is not to condone the bankrupt entering into business on behalf of the wound-up company.*

D

CIVIL PROCEDURE: *Suit – Locus standi – Locus standi to bring action – Suit by wound-up company seeking various reliefs following botched land transaction – Suit commenced by bankrupt applicant in name and on behalf of company – Whether suit competently brought – Whether applicant must seek and obtain sanction from Director General of Insolvency – Whether company had locus standi to bring and maintain suit*

E

CIVIL PROCEDURE: *Res judicata – Application – Suit by wound-up company seeking various reliefs following botched land transaction – Suit commenced by bankrupt applicant in name and on behalf of company – Issue of locus standi raised in courts – Whether issue on locus standi conclusively dealt with by courts – Whether attracted res judicata*

F

BANKRUPTCY: *Capacity of bankrupt – Locus standi – Locus standi to bring action – Suit by wound-up company seeking various reliefs following botched land transaction – Suit commenced by bankrupt applicant in name and on behalf of company – Whether suit competently brought – Whether applicant must seek and obtain sanction from Director General of Insolvency – Insolvency Act 1967, s. 38(1)(a), (d)*

G

COMPANY LAW: *Suit by company – Wound-up company – Locus standi – Suit commenced by bankrupt applicant in name and on behalf of company seeking various reliefs following botched land transaction – Whether suit competently brought – Companies Act 1965, ss. 216(2) & 236 – Companies Act 2016, ss. 438 & 486*

H

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CONTRACT: *Agreement – Sale and purchase agreement – Unjust enrichment – Entitlement to occupation of property rent-free throughout subsistence of agreement – Sale and purchase agreement terminated – Property continued to be occupied without payment of rent – Whether rent-free entitlement continued – Whether there was unjust enrichment*

The appellant and the respondent were both companies incorporated pursuant to the Companies Act 1965 ('CA'). The respondent had purchased 4 acres, with a first option to purchase the balance 6.2 acres of 10.2 acres of land, from PNSB Properties Sdn Bhd ('PNSB'). The 4 acres portion of the land had a warehouse and a two-storey office built thereon ('property'). The appellant later agreed to purchase the land with the property thereon at the price of RM24 million ('purchase price'). The discussion was confirmed in the respondent's letter ('agreement') which, amongst others, provided that: (i) the payment of 3% of the purchase price as earnest deposit and the balance of 7% of the purchase price ('initial deposit') must be paid when the sale and purchase agreement ('SPA') is signed to complete the initial deposit; (ii) the balance of the purchase price must be paid within three months and an additional one month from the signing of the SPA; and (iii) after the payment of the 10% initial deposit, the appellant would be given vacant possession of the property and the appellant must pay rent for occupying the property if the purchase of the land is aborted. The appellant paid the respondent the 3% earnest deposit and took possession of the property on March 2010. However, the SPA of the land with the property thereon had stalled and the respondent proposed the following terms: (i) the sale was only for 4 acres of the land with the property but does not include the option to purchase the remaining 6.2 acres of the land; (ii) the purchase price be reduced to RM17 million from RM24 million; and (iii) since the appellant had occupied the property without payment of any rental from 2010, the appellant shall be liable to pay quit rent and assessment on the property. The appellant replied, affirming its intention to purchase the whole 10.2 acres of the land. Pursuant to several further discussions between the parties, the respondent proposed that the purchase price be reduced to RM15.5 million for the 4 acres portion of the land only and rental would be imposed upon the execution of the SPA. However, due to issues that had arisen between the respondent and PNSB, the respondent informed the appellant that PNSB had withdrawn the offer to sell the remaining 6.2 acres portion of the land and requested further instructions from the appellant. The respondent did not receive any unequivocal response from the appellant. The respondent thus gave notice to the appellant that rental for the property would be imposed retrospectively for the appellant's occupation of the property commencing April 2012. The stalemate continued and no SPA was executed. In the course of it, the respondent was wound up. The respondent commenced a suit against the

A appellant in the High Court and claimed for various reliefs following the botched land transaction ('suit'). The respondent counterclaimed and applied to strike out the suit by reason that it was incompetently brought by the respondent without *locus standi* because the sanction obtained by the wound-up respondent was invalid as the applicant, one 'Devi Suppiah' B ('Devi') who was a contributory, was a bankrupt and hence had no *locus standi* to apply for sanction for the wound-up respondent. The High Court Judge ('HCJ') dismissed the respondent's striking out application and the appeals thereafter were also dismissed by the Court of Appeal and the Federal Court. The suit proceeded to trial and the HCJ allowed the suit in C part and dismissed the counterclaim. The appellant was dissatisfied with the outcome of the suit and hence, the present appeal on the grounds that: (i) the respondent had no *locus standi* in commencing the suit; and (ii) there was unjust enrichment benefitted by the appellant in not paying rental for the property. On the issue of *locus standi*, the respondent raised *res judicata*.

D **Held (allowing appeal in part)**
Per Lim Chong Fong JCA delivering the judgment of the court:

(1) There was no conclusive finding either way by the Federal Court on the appeal from the Court of Appeal in *Leopad Holdings Sdn Bhd v. Asian Shield Warehousing Sdn Bhd & Another Appeal* notwithstanding E that the appeal was dismissed. It was not clear whether it was an academic appeal or otherwise. The decisions of the High Court in *Asian Shield Warehousing Sdn Bhd v. Leopad Holdings Sdn Bhd,* and of the Court of Appeal that dismissed the appellant's striking out application and appeal, respectively, were not final and conclusive on the merits because F the suit was not struck out. In other words, the *locus standi* issue had to be redetermined at trial. Consequently, *res judicata* had not been attracted on the *locus standi* issue. (paras 32-34)

(2) For purposes of bringing the suit, it seemed that Devi must seek and obtain the previous sanction from the Director General of Insolvency G ('DGI') pursuant to s. 38(1)(a) and/or (d) of the Insolvency Act 1967 ('IA') but the law was unclear if this sanction was additional to that required from an ordinary non-bankrupt contributory. Nevertheless, it was clear here that Devi had, before the bringing of the suit, applied and obtained the sanction of the DGI as if she was an ordinary contributory. H Subsequently, she also twice applied for the sanction of the DGI and was retrospectively granted both. In actual fact, sanction of the DGI by reason of Devi's bankruptcy was not even necessary because the acts of instructing solicitors and bringing an action of debt recovery by Devi were consistent with winding-up that did not constitute management of I the wound-up company. It was not to condone Devi entering into business on behalf of the wound-up company. Accordingly, the retrospective sanctions sought by Devi pursuant to s. 38(1) of the IA

could be treated as done *abundans cautela*. The sanction which was originally sought by Devi and obtained from the DGI sufficed notwithstanding that it was not so stated in the application for purposes of s. 38(1)(a) or (d) of the IA. Hence, the DGI might have been unaware of Devi's bankruptcy. These omissions were not of material significance and consequence because it was the same liquidator, *ie*, the DGI, who was the person who gave the sanction. Moreover, the wide safeguard conditions already imposed by the DGI on the giving of the original sanction were adequate to account for Devi's bankruptcy at that material time. Further, it was unnecessary for Devi to make an application to seek the sanction of the DGI to bring an action pursuant to s. 236 of the CA, read with *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd*, coupled with another application pursuant to s. 38(1)(a) and/or (d) of the IA. In the premises, the respondent had *locus standi* to bring and maintain the suit. (paras 43-44 & 46-49)

(3) The agreement was only terminated upon the commencement of the suit on 1 November 2016. The payment of rent for the property should commence from 1 November 2016, instead of April 2012 as ordered by the HCJ. In either case, the respondent had satisfactorily met the tenets of unjust enrichment set out in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd*. Put simply, the appellant had, since the termination of the agreement, been enriched by the occupation of the property at the expense of the respondent without payment of rent, and there was no defence thereto. The appellant was liable to pay rent for the 4 acres portion of the land, including the property situated thereon, from 1 November 2016 till vacant possession was delivered. (paras 65 & 69)

(4) The appellant's appeal was partly allowed, and the High Court judgment and order were varied as per para. [82] of this judgment. The rest of the unvaried part of the High Court judgment and order stood enforceable. (paras 82 & 83)

Case(s) referred to:

Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal [2018] 2 CLJ 513 FC ***(refd)***

Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd [2007] 6 CLJ 93 FC ***(refd)***

Asian Shield Warehousing Sdn Bhd v. Leopad Holdings Sdn Bhd [2018] CLJU 1981; [2018] 1 LNS 1981 HC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Foo Fatt Chuen v. Jacobson Cheong Weng Hin & Ors [2012] 3 CLJ 632 HC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Harbutt's Plasticine Ltd v. Wayne Tank And Pump Co Ltd [1970] 1 QB 447 ***(refd)***

Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd [2012] 10 CLJ 88 CA ***(refd)***

Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor [1999] 1 CLJ 1 SC ***(refd)***

A *Lai Cheng Ooi v. Naslei Enterprise Sdn Bhd & Anor [2015] 10 CLJ 409 HC* ***(refd)***
Lai King Lung & Anor v. Merais Sdn Bhd [2020] 9 CLJ 449 FC ***(refd)***
Leopad Holdings Sdn Bhd v. Asian Shield Warehousing Sdn Bhd [2020] CLJU 697; [2020] 1 LNS 697 HC ***(refd)***
Leopad Holdings Sdn Bhd v. Asian Shield Warehousing Sdn Bhd & Another Appeal [2021] 1 CLJ 328 CA ***(refd)***
B *Oakwell Engineering International Pte Ltd v. PCM Feam (M) Sdn Bhd [2014] CLJU 511; [2014] 1 LNS 511 HC* ***(refd)***
Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd [2012] CLJU 1416; [2012] 1 LNS 1416 CA ***(refd)***
Re Cape Breton Company (1881) 19 Ch D 77 ***(refd)***
Re Wolverhampton Steel & Iron Co Ltd & Others (1977) 3 All ER 467 ***(refd)***
C *Small Medium Enterprise Development Bank Malaysia Bhd v. Oren Venture Sdn Bhd & Ors And Another Case [2022] 6 CLJ 148 HC* ***(dist)***
Tan Hock Chan v. Kho Teck Seng [1979] CLJU 110; [1979] 1 LNS 110 FC ***(refd)***
Winstech Engineering Sdn Bhd v. ESPL (M) Sdn Bhd [2014] 2 CLJ 1 FC ***(refd)***
Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd [2010] 3 CLJ 785 FC ***(refd)***

D **Legislation referred to:**
Companies Act 1965, ss. 216(2), 236(2)(a)
Companies Act 2016, ss. 438, 486(1)(a)
Insolvency Act 1967, ss. 8(1)(b), 38(1)(a), (d)

For the appellant - Alex De Silva & Joshua Lawson Cowie; M/s Bodipalar Ponnudurai De Silva
E
For the respondent - Ravichandran Subramaniam, Elaina Teng & Eizlan Farhan Nakhrowi; M/s Seah Balan Ravin & Co

[Editor's note: For the High Court judgment, please see Asian Shield Warehousing Sdn Bhd v. Leopad Holdings Sdn Bhd [2018] CLJU 1981; [2018] 1 LNS 1981 (overruled in part).]
F

Reported by Lina E

JUDGMENT

Lim Chong Fong JCA:

G

Introduction

[1] This is an after-trial appeal pertaining to a botched land sale transaction.

[2] The appellant/defendant and respondent/plaintiff are both companies
H incorporated pursuant to the Companies Act 1965. However, the respondent was wound up on 1 March 2013 and the official receiver (now Director General of Insolvency ("DGI")) was appointed as the liquidator.

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Background

[3] On 21 December 2005, the respondent purchased by way of lease 4 acres with a first option to purchase the balance 6.2 acres of 10.2 acres of land registered as HS(D) 1164005, PT No 231, Bandar Sultan Suleiman, Daerah Klang, Selangor ("land") from PNSB Properties Sdn Bhd ("PNSB").

[4] The aforesaid 4 acres portion of the land has a warehouse and two-storey office built thereon ("property").

[5] Pursuant to a discussion between the parties on or about 12 February 2010, the appellant agreed to purchase the land with the property thereon from the respondent at the price of RM24,000,000 ("purchase price").

[6] This discussion was confirmed by the respondent's solicitors, Messrs Ariffin Raj de Silva *vide* its letter dated 12 February 2010 ("agreement") which, amongst others, include:

(i) the sale of the land is subject to the approval of the relevant authority;

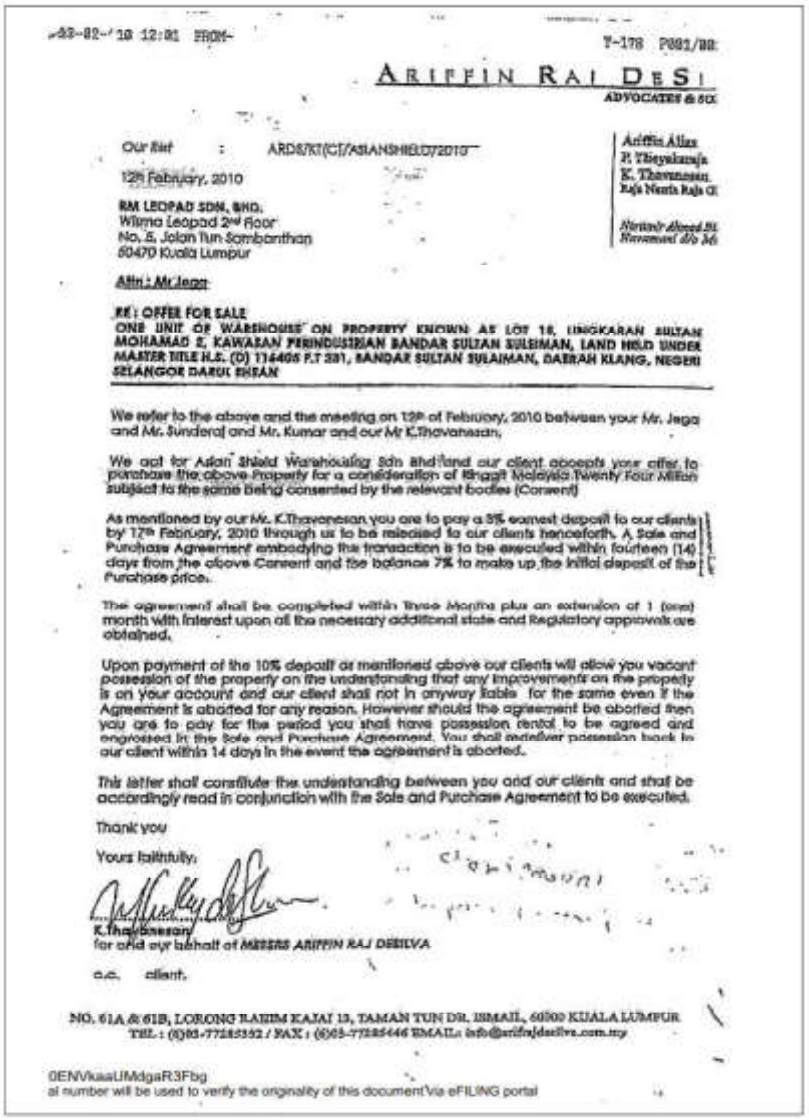
(ii) the payment of 3% of the purchase price as earnest deposit ("earnest deposit") and the balance 7% of the purchase price (collectively "initial deposit") must be paid when the sale and purchase agreement is signed to complete the initial deposit payment;

(iii) the sale and purchase agreement must be signed within 14 days of obtaining the State Authority's approval;

(iv) the balance of the purchase price must be paid within three months and an additional one month from the signing of the sale and purchase agreement;

(v) after the payment of the 10% initial deposit, the appellant will be given vacant possession of the property. The appellant must pay rent for occupying the property if the purchase of the land is aborted.

[7] It is gainful to reproduce the aforesaid letter:



-03-02-'10 12:01 FROM- T-178 P001/003

ARIFFIN RAI DESI
ADVOCATES & SOL

Our Ref : ARDS/KT(CL)/ASIANSHIELD/2010

12th February, 2010

Ariffin Alias
P. Theyakaraja
K. Thavanesan
Raja Nasrin Raja O

Nirmal Ahmad Bi
Hanamant M/o Ja

RM LEOPAD SDN. BHD.
Wisma Leopad 2nd Floor
No. 5, Jalan Tun Sambanthan
50470 Kuala Lumpur

Attn : Mr Jega

RE : OFFER FOR SALE
ONE UNIT OF WAREHOUSE ON PROPERTY KNOWN AS LOT 18, LINGKARAN SULTAN MOHAMAD 2, KAWASAN PERINDUSTRIAN BANDAR SULTAN SULEIMAN, LAND HELD UNDER MASTER TITLE H.S. (D) 114405 P.T 231, BANDAR SULTAN SULAIMAN, DAERAH KLANG, NEGERI SELANGOR DARUL EHSAN

We refer to the above and the meeting on 12th of February, 2010 between your Mr. Jega and Mr. Sundaraj and Mr. Kumar and our Mr K.Thavanesan.

We act for Asian Shield Warehousing Sdn Bhd and our client accepts your offer to purchase the above Property for a consideration of Ringgit Malaysia Twenty Four Million subject to the same being consented by the relevant bodies (Consent)

As mentioned by our Mr. K.Thavanesan you are to pay a 3% earnest deposit to our clients by 17th February, 2010 through us to be released to our clients henceforth. A Sale and Purchase Agreement embodying the transaction is to be executed within fourteen (14) days from the above Consent and the balance 7% to make up the initial deposit of the Purchase price.

The agreement shall be completed within three Months plus an extension of 1 (one) month with interest upon all the necessary additional state and Regulatory approvals are obtained.

Upon payment of the 10% deposit as mentioned above our clients will allow you vacant possession of the property on the understanding that any improvements on the property is on your account and our client shall not in anyway liable for the same even if the Agreement is aborted for any reason. However should the agreement be aborted then you are to pay for the period you shall have possession rental to be agreed and engrossed in the Sale and Purchase Agreement. You shall redeliver possession back to our client within 14 days in the event the agreement is aborted.

This letter shall constitute the understanding between you and our clients and shall be accordingly read in conjunction with the Sale and Purchase Agreement to be executed.

Thank you

Yours faithfully,

K.Thavanesan
for and on behalf of MESSRS ARIFFIN RAI DESILVA

c.c. client.

NO. 61A & 61B, LORONG RAHIM KAJAI 13, TAMAN TUN DR. ISMAIL, 60000 KUALA LUMPUR
TEL : (6)03-77285352 / FAX : (6)03-77285446 EMAIL: info@arifraidesilva.com.my

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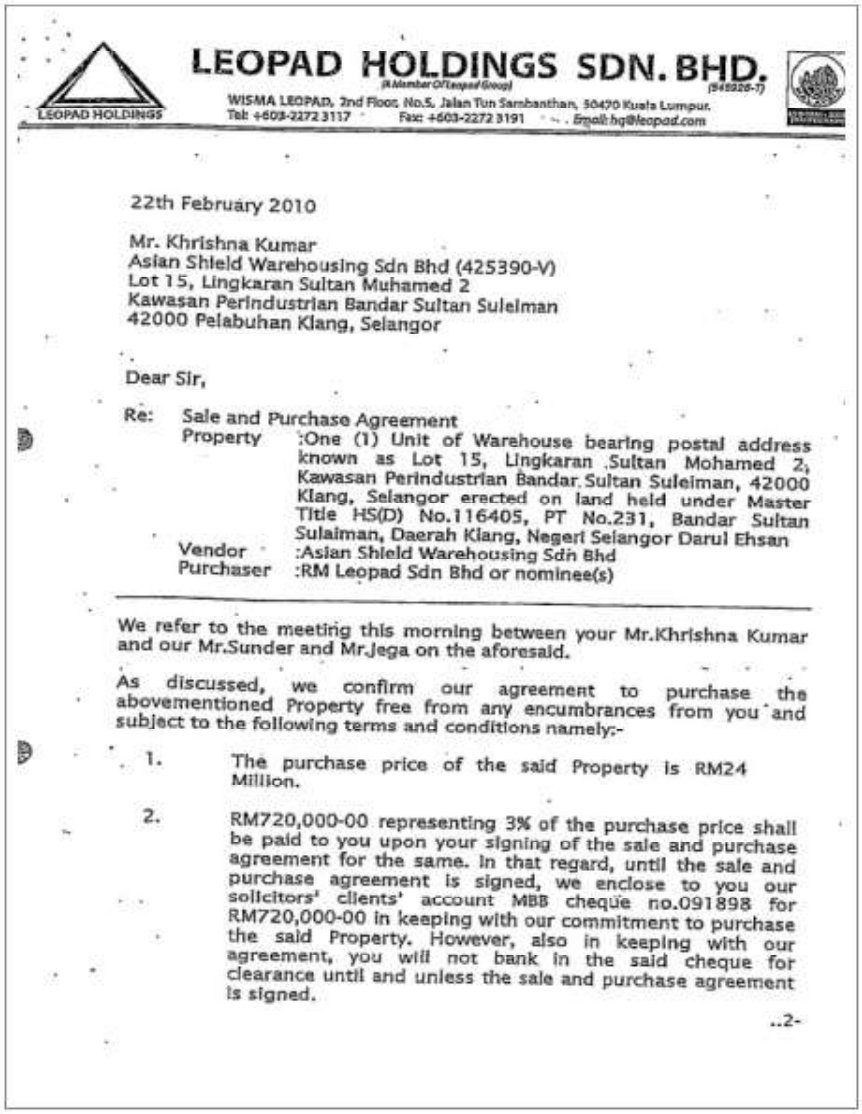
[8] There were subsequently further negotiations between the parties wherein the appellant paid the respondent the 3% earnest deposit sum of RM720,000.

[9] The respondent thereafter *via* a letter dated 1 March 2010 to the appellant, *inter alia*, confirmed the receipt of the cheque for RM720,000 earnest deposit payment pursuant to the agreement and again stated that the appellant would be given vacant possession of the property pending the execution of the sale and purchase agreement. It is also stated that all utilities and rates were to be borne by the appellant from the date when vacant possession is given. Again, it is gainful to reproduce the aforesaid letter:



LEOPAD HOLDINGS SDN. BHD.
(A Member Of Leopad Group) (548228-T)

LEOPAD HOLDINGS

WISMA LEOPAD, 2nd Floor, No.5, Jalan Tun Sambanthan, 50470 Kuala Lumpur.
Tel: +603-2272 3117 Fax: +603-2272 3191 Email: hq@leopad.com

22th February 2010

Mr. Khrishna Kumar
Asian Shield Warehousing Sdn Bhd (425390-V)
Lot 15, Lingkaran Sultan Muhamed 2
Kawasan Perindustrian Bandar Sultan Suleiman
42000 Pelabuhan Klang, Selangor

Dear Sir,

Re: Sale and Purchase Agreement
Property :One (1) Unit of Warehouse bearing postal address known as Lot 15, Lingkaran Sultan Mohamed 2, Kawasan Perindustrian Bandar Sultan Suleiman, 42000 Klang, Selangor erected on land held under Master Title HS(D) No.116405, PT No.231, Bandar Sultan Sulaiman, Daerah Klang, Negeri Selangor Darul Ehsan
Vendor :Asian Shield Warehousing Sdn Bhd
Purchaser :RM Leopad Sdn Bhd or nominee(s)

We refer to the meeting this morning between your Mr.Khrishna Kumar and our Mr.Sunder and Mr.Jega on the aforesaid.

As discussed, we confirm our agreement to purchase the abovementioned Property free from any encumbrances from you and subject to the following terms and conditions namely:-

1. The purchase price of the said Property is RM24 Million.

2. RM720,000-00 representing 3% of the purchase price shall be paid to you upon your signing of the sale and purchase agreement for the same. In that regard, until the sale and purchase agreement is signed, we enclose to you our solicitors' clients' account MBB cheque no.091898 for RM720,000-00 in keeping with our commitment to purchase the said Property. However, also in keeping with our agreement, you will not bank in the said cheque for clearance until and unless the sale and purchase agreement is signed.

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Page 2
Re: Sale and Purchase Agreement

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In that connection also, we record that in consideration of us tendering the said cheque to you, you agree to allow us to forthwith enter upon the said Property and occupy the warehouse premises erected upon the said Property without any charges whatsoever until the completion of the sale and purchase agreement. You also agree to allow us to use the office premises on the said Property within two (2) weeks of this letter pending your removal of your documents therein.

C

3. We also agree that you will on receipt of this letter forthwith furnish all necessary documentation including but not limited to your sale and purchase agreement with PKNS, the alienation letters, any other documentation evidencing your ownership and/or right to dispose or deal with the said Property and copies of the current quit rent and assessment (if any) receipts for the said Property.

D

4. We mutually agree to sign the sale and purchase agreement within two (2) weeks of this letter provided always there shall be no unnecessary delay by either party.

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5. With this letter and your receipt of our solicitors' clients' account MBB cheque no.091898, you also shall allow us to caveat the said Property.

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6. In the event that you failed, refused and/or neglected to sign the sale and purchase agreement, you shall forthwith return our solicitors' clients' account MBB cheque no.091898 to our solicitors immediately and we reserve our rights against you on account of such failure, refusal and/or neglect.

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Thank you.

Yours faithfully,
LEOPAD HOLDINGS SDN BHD

R. JEGA
MANAGING DIRECTOR

H

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[10] The appellant then took vacant possession of the property on 1 March 2010. A

[11] However, by a letter dated 26 January 2011, the respondent's new solicitors, Messrs A Farah Zabir & Partners, informed the appellant that the sale and purchase of the land with the property had stalled and proposed the following terms: B

(i) the sale is only for 4 acres portion of the land with the property but does not include the option to purchase the remaining 6.2 acres of the land;

(ii) the purchase price be reduced to RM17,000,000 from RM24,000,000;

(iii) since the appellant had occupied the property without payment of any rental from 2010, the appellant shall be liable to pay quit rent and assessment on the property; and C

(iv) the respondent's solicitors are to forward a draft sale and purchase agreement within three weeks from the date of acceptance of the revised offer. D

[12] This was due to financial difficulties faced by the respondent *vis-à-vis* SME Bank by reason of the loan taken to purchase the 4 acres portion of the land. As a result, this affected the ability of the respondent to conclude the purchase of the balance 6.2 acres portion of the land from PNSB. E

[13] However, the appellant *vide* its solicitor Messrs Paul Ong & Associates' letter dated 11 April 2011 replied still affirming the appellant's intention to purchase the whole 10.2 acres of the land.

[14] Thereafter, pursuant to several further discussions between the parties, the respondent *vide* its solicitors' letter dated 21 June 2011 further proposed that the purchase price be reduced to RM15,500,000 for the 4 acres portion of the land only and rental will be imposed upon the execution of the sale and purchase agreement. F

[15] However, due to issues that have arisen between the respondent and PNSB, the respondent *vide* its solicitors on 17 April 2012, informed the appellant's solicitors that PNSB had withdrawn the offer to sell the remaining 6.2 acres portion of the land and requested for further instructions from the appellant. It is gainful to reproduce the aforesaid letter: G

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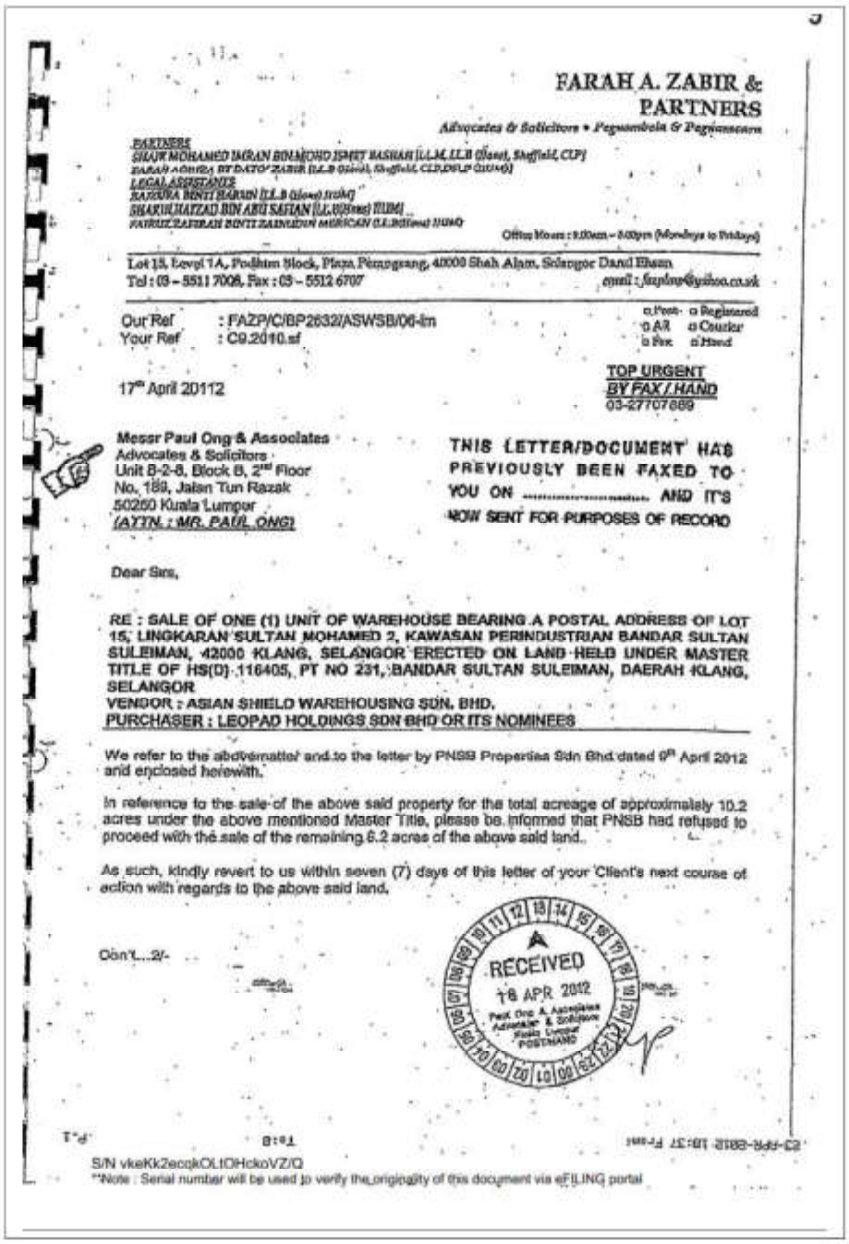

FARAH A. ZABIR & PARTNERS

Advocates & Solicitors • Peguambela & Peguamcara

PARTNERS
SHAIK MOHAMED IMRAN BIN MOHD ISMET HASHAH (LLM, LL.B (Hons), Sheffield, CLP)
FARAH ADHIRA BT DATO' ZABIR (LL.B (Hons), Sheffield, CLP, DSLP (UUM))
LEGAL ASSISTANTS
RAZIURA BINTI HARUN (LL.B (Hons) IIUM)
SHARUL HAFIZAD BIN ABU SAFIAN (LL.B(Hons) IIUM)
FATHUL FAZRAN BINTI ZAINUDIN MERICAN (LL.B(Hons) IIUM)

Office Hours : 9.00am – 5.00pm (Mondays to Fridays)

Lot 15, Level 1A, Podium Block, Plaza Perangsang, 40000 Shah Alam, Selangor Darul Ehsan
Tel : 03 – 5511 7008, Fax : 03 – 5512 6707 email : farplaw@yahoo.co.uk

Our Ref : FAZP/C/BP2632/ASWSB/06-lm
Your Ref : C9.2010.sf

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☐ AR ☐ Courier
☐ Fax ☐ Hand

17th April 20112

TOP URGENT
BY FAX / HAND
03-27707689

Messr Paul Ong & Associates
Advocates & Solicitors
Unit 8-2-8, Block 8, 2nd Floor
No. 189, Jalan Tun Razak
50250 Kuala Lumpur
(ATTN : MR. PAUL ONG)

THIS LETTER/DOCUMENT HAS PREVIOUSLY BEEN FAXED TO YOU ON ..... AND IT'S NOW SENT FOR PURPOSES OF RECORD

Dear Sirs,

RE : SALE OF ONE (1) UNIT OF WAREHOUSE BEARING A POSTAL ADDRESS OF LOT 15, LINGKARAN SULTAN MOHAMED 2, KAWASAN PERINDUSTRIAN BANDAR SULTAN SULEIMAN, 42000 KLANG, SELANGOR ERECTED ON LAND HELD UNDER MASTER TITLE OF HS(D) 116405, PT NO 231, BANDAR SULTAN SULEIMAN, DAERAH KLANG, SELANGOR
VENDOR : ASIAN SHIELD WAREHOUSING SDN. BHD.
PURCHASER : LEOPAD HOLDINGS SDN BHD OR ITS NOMINEES

We refer to the abovemattter and to the letter by PNSB Properties Sdn Bhd dated 9th April 2012 and enclosed herewith.

In reference to the sale of the above said property for the total acreage of approximately 10.2 acres under the above mentioned Master Title, please be informed that PNSB had refused to proceed with the sale of the remaining 6.2 acres of the above said land.

As such, kindly revert to us within seven (7) days of this letter of your Client's next course of action with regards to the above said land.

Con't...2/-

RECEIVED
18 APR 2012
Paul Ong & Associates
Advocates & Solicitors
Kuala Lumpur
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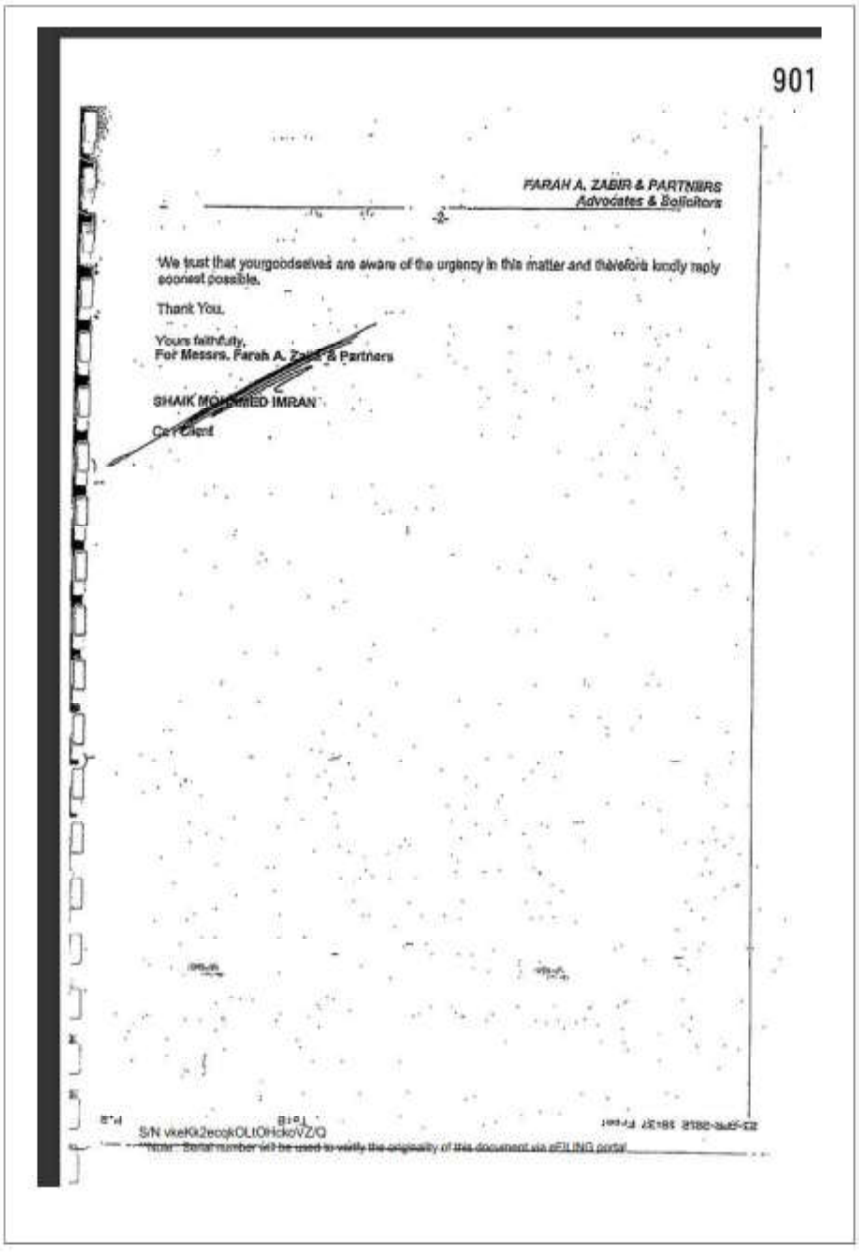

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FARAH A. ZABIR & PARTNERS
Advocates & Solicitors

We trust that yourgoodselves are aware of the urgency in this matter and therefore kindly reply soonest possible.

Thank You.

Yours faithfully,
For Messrs. Farah A. Zabir & Partners

SHAIK MOHAMED IMRAN
Our Client

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[16] The respondent did not receive any unequivocal response from the appellant as seen in the appellant solicitors' letter dated 7 May 2012 reproduced below:

L ..ING TENG KEK
..AN SAN
..K YEE
..L DANIEL
..ai TEE

PAUL ONG & ASSOCIATES
ADVOCATES AND SOLICITORS

Unit No. B-3-8
Block B 3rd Floor
Megan Avenue 1
No. 189 Jalan Tun Razak
50400 Kuala Lumpur
Tel: 21631188 Fax: 27707889
E-mail: paulo@soylaw.com.my

Office Hours: 8.30am to 5.45pm
Closed On Saturdays & Sundays

五鹿華律師樓

..r ref: C9.2010/sf
..ur ref: FAZP/C/BP2636/ASWSB/06-lm

..th May 2012

..ssrs Farah A.Zabir & Partners
..vocates & Solicitors
.. 15, Level 1A, Podium Block
..aza Perangsang
..000 Shah Alam
..angor

..n: En.Shaik Imran

WITHOUT PREJUDICE
BY FAX No.03-5512 6707 & BY POST

..ar Sirs,

Sale and Purchase Agreement:
Property: Lot 15, Lingkaran Sultan Mohamed 2, Kawasan Perindustrian Bandar Sultan Suleiman, 42000 Klang, Selangor
Vendor: Asian Shield Warehousing Sdn Bhd
Purchaser: RM Leopad Sdn Bhd

..e refer to the above matter and your letter of 17th April 2012.

..dly be informed that we are waiting for our client's instructions and will reply your letter herein due course.

..anwhile, please confirm if your clients will assign their right to buy the balance of approximately .. acres of land as part of the purchase consideration to the abovementioned sale and purchase ..reement.

..ank you.

..urs faithfully,
..ssrs Paul Ong & Associates

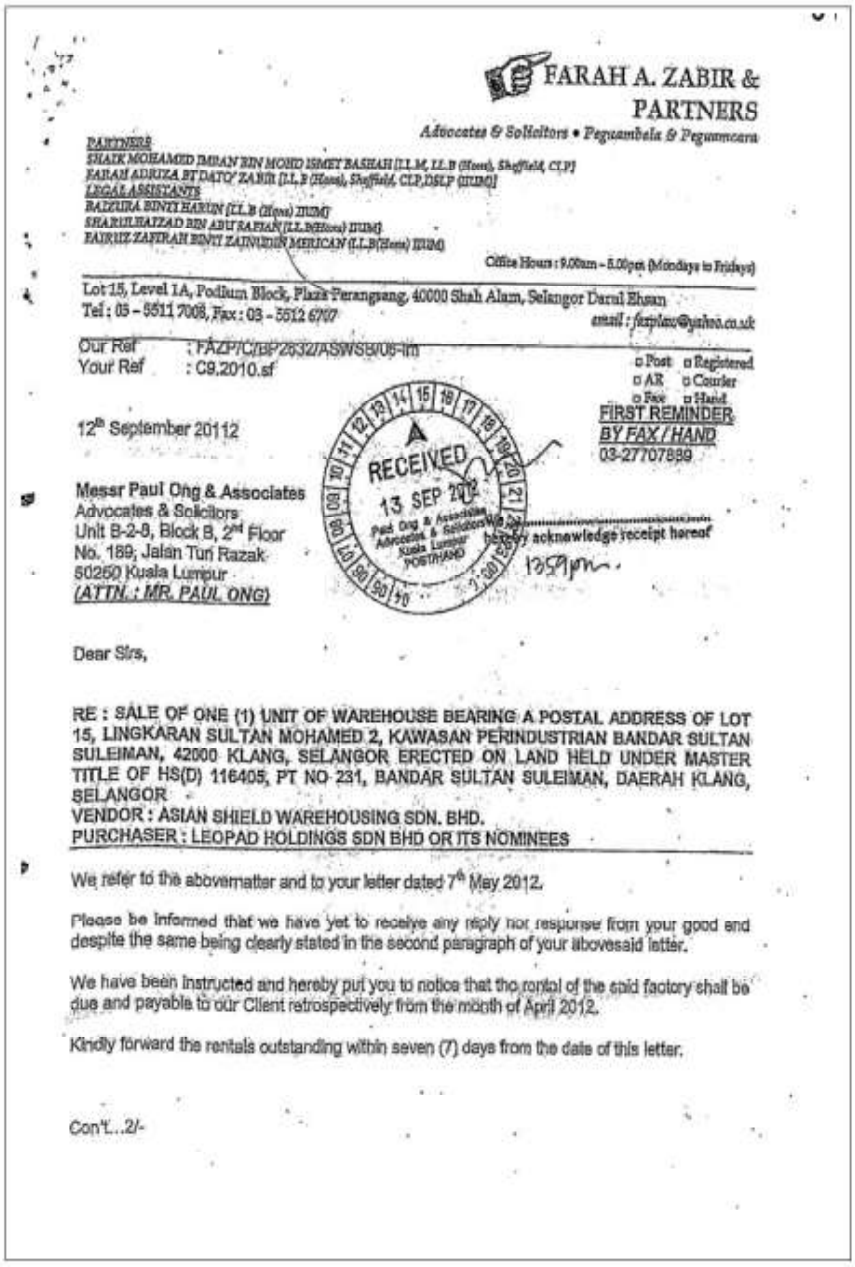
..client
Attn:Mr.Jega

by f

S/N vkeKk2ecqkOLtOHckoVZ/Q
**Note : Serial number will be used to verify the originality of this document via eFILING portal

[17] The respondent, thus *vide* its solicitors' letter dated 12 September 2012, gave notice to the appellant that rental for the property will be imposed retrospectively for the appellant's occupation of the property commencing April 2012. It is also gainful to reproduce the aforesaid letter:

[This space is intentionally left blank]



FARAH A. ZABIR & PARTNERS

Advocates & Solicitors • Peguambela & Peguamcara

PARTNERS
SHAIK MOHAMED IMRAN BIN MOHD ISMET BASHAH [LL.M, LL.B (Hons), Sheffield, CLP]
FARAH ADRIZA BT DATO' ZABIR [LL.B (Hons), Sheffield, CLP, DSLP (IIUM)]
LEGAL ASSISTANTS
RAZZURA BINTI HARUN [LL.B (Hons) IIUM]
SHARULHAIZAD BIN ABU RAZIAN [LL.B(Hons) IIUM]
FAIRUZ ZAFIRAH BINTI ZAINUDIN MERICAN [LL.B(Hons) IIUM]

Office Hours : 9.00am – 5.00pm (Mondays to Fridays)

Lot 15, Level 1A, Podium Block, Plaza Perangsang, 40000 Shah Alam, Selangor Darul Ehsan
Tel : 03 – 5511 7008, Fax : 03 – 5512 6707
email : farplaw@yahoo.co.uk

Our Ref : FAZP/C/BP2632/ASWSB/06-lm
Your Ref : C9.2010.sf

□ Post □ Registered
□ AR □ Courier
□ Fax □ Hand

FIRST REMINDER
BY FAX / HAND
03-27707899

12th September 20112

RECEIVED
13 SEP 2012
Paul Ong & Associates
Advocates & Solicitors
Kuala Lumpur
POSTHAND

Messr Paul Ong & Associates
Advocates & Solicitors
Unit B-2-9, Block B, 2nd Floor
No. 189, Jalan Tun Razak
50250 Kuala Lumpur
(ATTN. : MR. PAUL ONG)

We hereby acknowledge receipt hereof
12.59pm.

Dear Sirs,

RE : SALE OF ONE (1) UNIT OF WAREHOUSE BEARING A POSTAL ADDRESS OF LOT 15, LINGKARAN SULTAN MOHAMED 2, KAWASAN PERINDUSTRIAN BANDAR SULTAN SULEIMAN, 42000 KLANG, SELANGOR ERECTED ON LAND HELD UNDER MASTER TITLE OF HS(D) 116405, PT NO 231, BANDAR SULTAN SULEIMAN, DAERAH KLANG, SELANGOR
VENDOR : ASIAN SHIELD WAREHOUSING SDN. BHD.
PURCHASER : LEOPAD HOLDINGS SDN BHD OR ITS NOMINEES

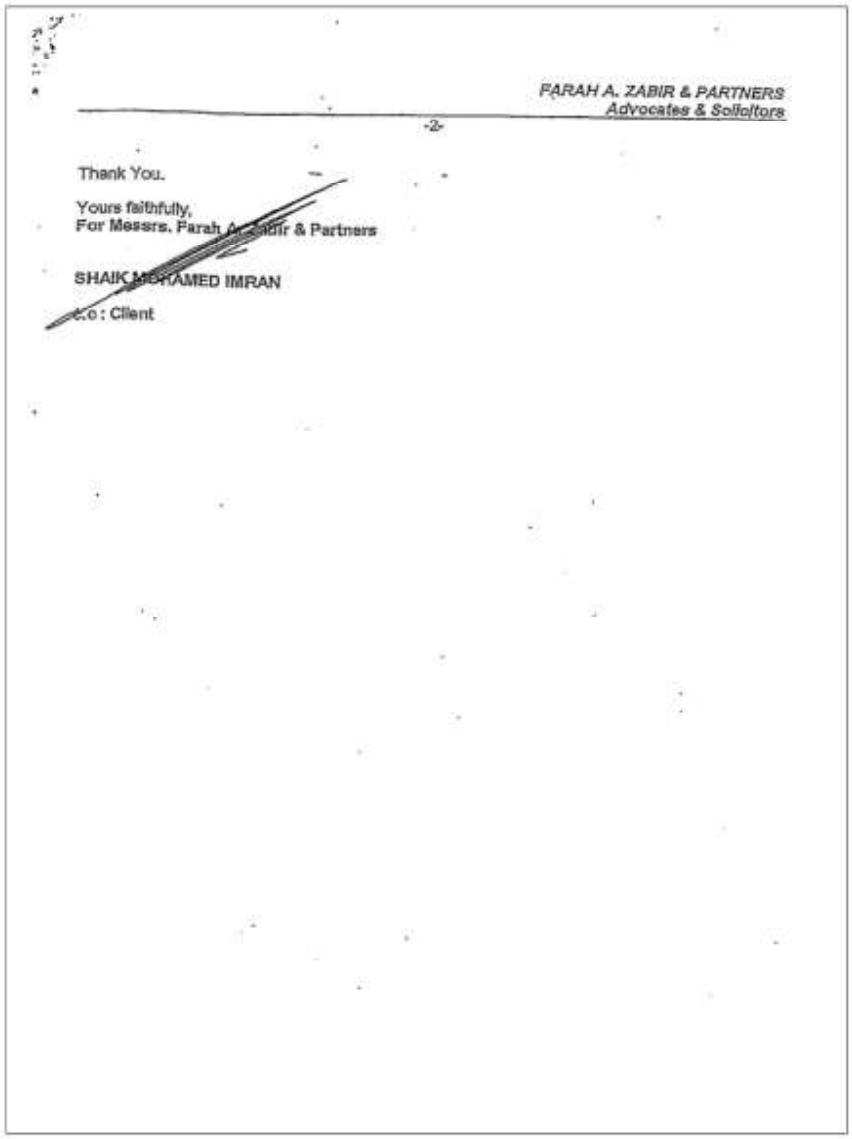
We refer to the abovematter and to your letter dated 7th May 2012.

Please be informed that we have yet to receive any reply nor response from your good end despite the same being clearly stated in the second paragraph of your abovesaid letter.

We have been instructed and hereby put you to notice that the rental of the said factory shall be due and payable to our Client retrospectively from the month of April 2012.

Kindly forward the rentals outstanding within seven (7) days from the date of this letter.

Con't...2/-



FARAH A. ZABIR & PARTNERS
Advocates & Solicitors

-2-

Thank You.

Yours faithfully,
For Messrs. Farah A. Zabir & Partners

SHAIK MOHAMED IMRAN

c.c : Client

[18] Nonetheless, the stalemate continued and no sale and purchase agreement has been executed by the parties at all. There was however an exchange of correspondences between the parties' respective solicitors on allegations of breach of the agreement against each other. In the course of it, the respondent was compulsorily wound up.

[19] Finally, the respondent on 1 November 2016, commenced the suit against the appellant in the High Court ("suit") and claimed for the following:

> 23. Oleh hal yang demikian, Plaintif ingin memohon untuk suatu penghakiman seperti berikut:
>
> (i) Defendan memberikan milikan kosong ke atas hartanah tersebut di bawah H.S.(D) 116405, P.T. No. 231, Bandar Sultan Suleiman, Daerah Klang Selangor dengan Gudang yang dibina di atasnya dan mempunyai alamat Lot 15, Lingkaran Sultan Mohamed 2, Kawasan Perindustrian Bandar Sultan Suleiman, 4200 Klang, Selangor Darul Ehsan ('hartanah tersebut') kepada Plaintif dalam tempoh tiga puluh (3) hari dari tarikh penghakiman;
>
> (ii) Defendan membayar kepada Plaintif sewa dan/atau pampasan yang akan ditaksirkan dari 1.3.2010 sehingga April 2012;
>
> (iii) Defendan membayar kepada Plaintif sewa dan/atau sewa berganda yang akan ditaksirkan dari April 2012 sehingga tarikh pemilikan kosong diberikan;
>
> (iv) Secara tambahan, dan/atau alternatif, ganti rugi dan/atau pampasan yang akan ditaksirkan dan dibayar oleh Defendan bagi tempoh Defendan menduduki dan menggunakan hartanah tersebut sehingga tarikh pemilikan kosong diberikan;
>
> (v) Defendan membayar cukai tanah, cukai taksiran, utiliti tertunggak dan semua bayaran yang berkenaan hartanah tersebut ketika Defendan mendudukinya iaitu dari 1.3.2010 sehingga tarikh pemilikan kosong diberikan;
>
> (vi) Wang cengkeram sebanyak RM 720,000.00 yang dibayar oleh Defendan kepada Plaintif dikontrakan dengan jumlah yang terhutang dalam perenggan-perenggan (ii),(iii),(iv) dan/atau (v);
>
> (vii) Defendan membatalkan kaveat persendirian No. 56224/2010 yang dimasukkan pada 4.11.2010 dan/atau mana-mana kaveat persendirian yang dimasukkan oleh Defendan ke atas hartanah tersebut;
>
> (viii) Defendan dilarang daripada masuk sebarang kaveat selanjutnya ke atas hartanah tersebut;
>
> (ix) Faedah sebanyak 5% ke atas perenggan-perenggan (ii), (iii), (iv) dan/atau (v) dari tarikh masing-masing wujud sehingga tarikh penghakiman;

A (x) Faedah sebanyak 5% ke atas perenggan (ii),(iii),(iv) dan/atau (v) dari tarikh penghakiman sehingga tarikh penyelesaian penuh;

(xi) Kos; dan

(xii) Apa-apa perintah atau relif selanjutnya atau lain sebagaimana yang difikirkan adil dan patut oleh Mahkamah yang Mulia ini.

B The appellant, in response, counterclaimed against the respondent for the following:

57. Oleh hal yang demikian, Defendan menuntut balas daripada Plaintif:

C 57.1 wang sejumlah RM 21,000,000.00 iaitu kehilangan penggunaan 6.2 ekar daripada Tanah tersebut dan masih berlanjutan sehingga tarikh penghakiman;

57.2 secara tambahan dan/atau secara alternatif ganti rugi am untuk ditaksirkan;

D 57.3 faedah ke atas perenggan 57.1 dan/atau 57.2 di atas pada kadar 5% setahun dari tarikh pemfailan Tuntutan Balas ini sehingga tarikh penyelesaian penuh;

57.4 Kos;

57.5 lain-lain perintah dan/atau relif yang difikirkan adil dan sesuai oleh Mahkamah yang mulia ini.

E **In The High Court**

[20] The appellant initially, amongst other applications, applied to strike out the suit by reason that it was incompetently brought by the respondent without *locus standi* because the sanction obtained by the wound up F respondent is invalid because the applicant, Devi a/p Suppiah ("Devi") who is a contributory, is a bankrupt and hence, has no *locus standi* to apply for sanction for the wound-up respondent company.

[21] However, the striking out application was dismissed by the High Court G and the appeal thereafter was also dismissed by this court as reported in *Asian Shield Warehousing Sdn Bhd v. Leopad Holdings Sdn Bhd* [2018] CLJU 1981; [2018] 1 LNS 1981 and *Leopad Holdings Sdn Bhd v. Asian Shield Warehousing Sdn Bhd & Another Appeal* [2021] 1 CLJ 328 respectively. Leave was given to appeal to the Federal Court but the appeal in the Federal Court was dismissed without determining the leave questions posed.

H **[22]** Consequently, the suit proceeded to trial and the learned High Court Judge found as follows in the judgment dated 22 January 2020 ("judgment") reported in *Leopad Holdings Sdn Bhd v. Asian Shield Warehousing Sdn Bhd* [2020] CLJU 697; [2020] 1 LNS 697 with emphasis added by us:

I

[4] The Plaintiff has, based on the overall evidence, material facts and circumstances, proved that it is the beneficial owner of 4 acres of the subject land with an option to purchase the balance 6 ½ acres subject to the approval of the relevant authority or authorities. This fact was from the outset within the knowledge of the Defendant and was the basis of the understanding between the parties when the original Sale and Purchase Agreement ('SPA') was entered into between them following the Plaintiff's Letter of Offer ('LOO') to the Defendant dated 22.10.2010 for the purchase price of RM24 million. The offer was accepted by the Defendant upon payment of the agreed deposit of 3% or RM720,000.00. However, the sale could not be completed due to the Plaintiff's inability to secure the Option To Purchase ('OTP') and the Defendant's insistence to purchase the entire 10 ½ acres.

…

[6] *From the facts, it was indisputable that the Defendant had no intention of purchasing the property less the balance 6.25 acres that the relevant state authority eventually refused to sell to the Plaintiff who, hence, was no longer in a position to sell the whole property to the Defendant. As the SPA between the parties could not for this reason be completed and had effectively come to an end the agreement to allow the Defendant to occupy the said property naturally became no longer enforceable. As a result, the continued occupation by the Defendant of the said property upon issuance of the Plaintiff's notice dated 12.09.2012 could only be considered as a tenant and not as an intended purchaser. Having full knowledge that the SPA could no longer be executed, the Defendant's continued occupation without paying any rental for several years would clearly constitute unconscionable conduct and unjust enrichment by the Defendant*. It was certainly to the detriment of the Plaintiff's rights as the beneficial owner of the said property who had been wrongfully deprived of use of his property and compensation for the loss of use over a prolonged period.

[7] As regards the Defendant's manifest intention not to proceed with the sale without the balance 6.25 acres of the land, upon the exchange of a series of correspondence between the parties together with their solicitors, the Defendant ought to have realised that they will not be able to buy the said property together with the option to purchase the balance of the said land (*ie*, after the Defendant paid the 3% earnest deposit to the Plaintiff on 01.03.2010). The Defendant should have thereafter demanded the earnest deposit and vacated the said property but the Defendant failed or neglected to do so. In effect, the Defendant could be considered to have altered its position to carry on with the sale without the option to purchase the balance of the said land. The said non-interest of the Defendant in completing the purchase is further evidenced by the fact that until to-date the Defendant as the purchaser did not prepare the sale and purchase agreement for the lesser acreage and instead, continued to occupy the said property without paying any rental for 8.5 years.

In view of the Defendant's and its solicitors' lack of response to the Plaintiff's solicitors' letters in regard to the preparation of the Draft SPA, there was an element of procrastination on the part of the Defendant for its own benefit and enrichment, *ie*, to continue occupation of the land unreasonably without paying any rentals for a prolonged period.

[8] The Defendant's position on the purported lapse or termination of the original SPA is this. It was contended that, notwithstanding the grievances the Plaintiff may have (which they have created for themselves), the fact of the matter is the Plaintiff did not terminate the transaction and neither did they return the earnest deposit of RM720,000.00 to the Defendant. This is crucially important. Without a valid termination, the transaction between the parties is deemed to be still open. It was also stressed that if the Plaintiff intends a closure to the transaction they must expressly make it known to the Defendant. The Plaintiff also has no right to retrain the earnest deposit and unilaterally apply to set off the same towards purported arrears of rental which is being claimed. That would be considered unfair and unconscionable on the Plaintiff's part.

[9] However, contrary to the Defendant's proposition, *it is crucial to note that the original SPA fell through when it was communicated to the Defendant that the Plaintiff was unable to secure the consent of the authorities to purchase the balance 6.25 acres and the Defendant had evinced an intention not to proceed with the purchase of the land with a lesser acreage than originally offered. There was, thus, no question of the original SPA pending execution. It followed that the agreement for the Defendant to occupy the land rent free pending the execution of the SPA had lapsed and was no longer effective. To suggest otherwise for the Defendant to continue the occupation without rent for an inordinate period of time when it became clear that the SPA had reached a stalemate would be wrongful and lead to unjust consequences to the Defendant.*

…

[13] In resisting the allegation of unjust enrichment against the Defendant upon receiving the Plaintiff's notice to pay rentals, it was also contended by the Defendant that it was evident from the outset that the Plaintiff intended to sell 10.25 acres of the said Land with the warehouse thereon and the Defendant was desirous of purchasing the same. Hence, even though it was subsequently discovered that the Plaintiff had beneficial ownership of only 4 acres as alluded to, the contractual obligation was on the Plaintiff to secure the entire 10.25 acres for sale to the Defendant as agreed to. In any case, that time was never made the essence of the transaction as confirmed by the Plaintiff's former directors and solicitor (PW2, PW3 and PW4). In addition, that the Defendant had shown a consistent interest to complete the transaction whereas the Plaintiff failed to overcome the difficulties in performing its aforementioned obligation …

…

[22] As to the question of *locus standi* was only raised in submissions and was a non-issue at the trial where no evidence thereof was led during the trial it cannot now be invoked to defeat the Plaintiff's claim *in limine*. It is the same for issues of absolute assignment, no vest order and not having sanction which can be regarded as prejudicial to the Plaintiff if these unpleaded issues are considered in determining the outcome of the action.

…

[30] To summarise, after the termination of the 1st SPA, there was eventually no concluded SPA between the parties for sale of the subject land or any part thereof. Hence, thereafter, any continued occupation of the Plaintiff's property by the Defendant without the Plaintiff's consent and compensation being paid would be considered unlawful and wrongful. *On the facts and circumstances alluded to, this is a clear case of unjust enrichment by the Defendant for occupation without reasonable compensation to the Plaintiff. Therefore, upon receipt of the Plaintiff's Notice dated 12.9.2012, the Plaintiff was entitled to be paid compensation and/or arrears of rental for continued occupation of the property from April 2012 when negotiations for the purchase of the property by the Defendant came to an end.*

…

[32] *It was plain in this instance that the present facts did not in any respect support this line of defence as this is a clear case of unjust enrichment at the expense of the Plaintiff who faced a predicament in securing a positive response from the authorities in order to complete the sale as agreed owing to circumstances beyond his control. Despite becoming aware that the intended purchase could not be concluded, the Defendant continued to occupy the land but refused to pay any rental although the Plaintiff made an express demand for rentals.*

[33] In the Court's considered view and finding, the Plaintiff has on a balance of probabilities proved its claim against the Defendant as per paragraphs 19, 20 and 21 of the Statement of Claim ('SOC') and for unjust enrichment as per paragraph 24 of the same.

[34] Judgment will, accordingly, be entered for the Plaintiff as prayed for in paragraph 23, SOC for the following prayers only with variations as below:

(a) Prayer (i) for 4 acres only of the land under the Plaintiff's beneficial ownership within 4 months.

(b) Prayer (iii) dismissed due to the absence of any tenancy/agreement between the parties.

(c) Prayer (ii) RM120,000.00 from 04/2012 - 12/2016; and RM165,000.00 from 01/2017 – up to vacant possession being delivered up.

(d) Prayers (v), (vi), (vii) & (viii) as prayed.

(e) Prayer (ix) interest at 4% per annum for the items claimed that have been allowed.

A (f) Prayer (x) as prayed in respect of the claims allowed.

(g) Prayer (xi) costs in the sum to be fixed by the Court.

(h) Prayers (vii) & (viii).

(i) Prayer (iv): No order.

B (j) Prayer (v): Subject to deduction of payments already made.

[35] The Defendant's Counter Claim for the reasons elaborated has not been proved on the applicable standard of proof and is, accordingly, dismissed with costs. (emphasis added)

C **[23]** The appellant was dissatisfied with the outcome of the suit and thus lodged its appeal on 20 February 2020.

Findings Of This Court

[24] Before us, the appellant divided its appeal into two stages, *viz*:

D (i) the respondent's *locus standi* in commencing the suit; and

(ii) unjust enrichment benefited by the appellant in not paying rental for the property

We will deal with both of them *seriatim*.

E ***Locus Standi***

[25] The appellant primarily re-advanced here its contentions raised in the aforesaid striking out applications as well as after-trial. According to the appellant, there was a new factual narrative as put forth by the respondent during the striking out appeal in the Federal Court that it was the Director F General of Insolvency ("DGI") himself (and not Devi who sought for sanction) that commenced the suit. As a result, the appeal was found to be unnecessary. However, the appellant only discovered on 14 January 2022 that the aforementioned new factual narrative is wholly inaccurate and erroneous, as confirmed by the DGI that it was indeed Devi who sought for G sanction from the DGI. Towards this end, the appellant successfully obtained the order to adduce further evidence of the DGI from this court on 4 October 2022. It is gainful to reproduce the aforesaid letter:

H

I

JABATAN INSOLVENSI NEGERI SELANGOR
EAST ENTRANCE
LOT F23-F45 TINGKAT 1,
BANGUNAN IDCC SHAH ALAM,
JALAN PAHAT L 13/L,
SEKSYEN 15
40200 SHAH ALAM
SELANGOR DARUL EHSAN

Talian : 03-55459360 (Umum)
03-55459711 (Kebankrapan)
03-55459700 (Likuidasi)
Web : www.mdi.gov.my

Ruj. Tuan :
Ruj. Kami : LC000352/2013/H
Tarikh : 14 JAN 2022

Menteri di Jabatan Perdana Menteri (Parlimen dan Undang-Undang)
Bangunan Hal Ehwal Undang-Undang
Presint 3, Putrajaya
62692 Wilayah Persekutuan
PUTRAJAYA

YBhg. Dato' Sri,

Per: Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016 Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) v Leopad Holdings Sdn. Bhd.

Dengan segala hormatnya perkara di atas adalah dirujuk.

2. Melalui surat ini, kami ingin mengesahkan bahawa mengikut rekod Jabatan Insolvensi Malaysia, Ketua Pengarah Insolvensi telah meluluskan suatu permohonan sanksi yang telah dibuat oleh salah seorang penyumbang syarikat bernama Devi a/p Suppiah (No. K/P: 551207-10-5434) bagi syarikat Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) bertujuan untuk memulakan dan meneruskan tindakan undang-undang atas nama syarikat Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi), sebagai Plaintif terhadap Leopad Holdings Sdn. Bhd. sebagai Defendan.

3. Berikut adalah permohonan kebenaran sanksi yang diluluskan di bawah seksyen 236 Akta Syarikat 1965 bagi tindakan Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016, Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) v Leopad Holdings Sdn. Bhd.:

Bil	Tarikh Diluluskan	Pemohon	Keterangan
1.	21.10.2016 (No. Rujukan: Mdl/157/005/52/2013).	Devi a/p Suppiah, No. K/P: 551207-10-5434 sebagai penyumbang syarikat.	Melantik firma peguam Tetuan Sesh Balan Ravi & Co. bagi memulakan dan

			meneruskan tindakan undang-undang.
2.	15.4.2021 (No. Rujukan: LC000352/2013/H).	Fathlyah binti Abdul Halyum (No. K/P: 850718-10-5938) sebagai penyumbang syarikat.	Melantik firma peguam Tetuan Seah Balan Ravi & Co. bagi membela diri dalam Notis Permohonan bertarikh 12.1.2021 yang difailkan oleh Leopad Holdings Sdn. Bhd. di dalam tindakan di dalam kes guaman Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016.

4. Seterusnya, berikut adalah permohonan kebenaran sanksi yang diluluskan di bawah seksyen 38(1)(a) Akta Kebankrapan 1967 kepada Devi a/p Suppiah (No. K/P: 551207-10-5434) bagi tindakan Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016, Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) v Leopad Holdings Sdn. Bhd.:

Bil.	Tarikh Diluluskan	Pemohon	Keterangan
1.	6.3.2018 (No. Rujukan: BP0000062/2014/ 381A(6)).	Devi a/p Suppiah, No. K/P: 551207-10-5434.	Kebenaran meneruskan tindakan di dalam kes guaman Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016, Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) v Leopad Holdings Sdn. Bhd. dengan sanksi yang berkuatkuasa secara retrospektif daripada tarikh 21.10.2016 berdasarkan syarat-syarat yang dinyatakan di dalam surat tersebut.

2.	20.6.2018 (No. Rujukan: BP0000062/2014/ 381A(6)).	Devi a/p Suppiah, No. K/P: 551207-10-5434.	Kebenaran meneruskan tindakan di dalam kes guaman Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016, Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) v Leopad Holdings Sdn. Bhd. dengan sanksi yang berkuatkuasa secara retrospektif daripada tarikh pemfailan 30.9.2016 berdasarkan syarat-syarat yang dinyatakan di dalam surat tersebut.

5. Selanjutnya, Jabatan Insolvensi Malaysia, Cawangan Selangor juga telah mengeluarkan surat bertarikh 3.8.2021 dan 21.8.2021 kepada Tetuan Bodipalar Ponnudurai De Silva iaitu peguam mewakili Leopad Holdings Sdn. Bhd. di dalam kes guaman Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016, Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) v Leopad Holdings Sdn. Bhd. berkenaan pengesahan berkenaan kebenaran sanksi yang diberikan kepada Devi a/p Suppiah.

6. Selain itu juga, pertikaian kebenaran sanksi yang diberikan kepada Devi a/p Suppiah bagi kes kebankrapan dan juga sebagai penyumbang Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) di dalam kes guaman Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016, Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) v Leopad Holdings Sdn. Bhd. telah diputuskan oleh Mahkamah Persekutuan, Rayuan Sivil No.: 02(i)-2-01/2021(B) melalui perintah bertarikh 26.7.2021 iaitu rayuan (Leopad Holdings Sdn. Bhd.) ditolak dengan kos sebanyak RM70,000.00 kepada Ketua Pengarah Insolvensi tertakluk kepada alokatur.

7. Selanjutnya, kami juga ingin mengesahkan bahawa Jabatan Insolvensi tidak terlibat langsung dengan tindakan kes guaman Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016, Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) v Leopad Holdings Sdn. Bhd. samada melantik peguam atau dalam memberi arahan kepada peguam atau dalam apa jua perkara berkenaan tindakan guaman di atas bagi pihak Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) atau mana-mana pihak lain.

Perhatian dan kerjasama pihak YBhg. Dato' Sri berhubung perkara di atas amat dihargai.

Sekian, terima kasih.

"WAWASAN KEMAKMURAN BERSAMA 2030"

"BERKHIDMAT UNTUK NEGARA"

Saya yang menjalankan amanah,

(SITI NUR SHAFRIDA BINTI HASHIM)
Pengarah Insolvensi Negeri
Jabatan Insolvensi Malaysia (MdI)
Negeri Selangor.

s.k:

Jabatan Insolvensi Malaysia,
Bahagian Likuidasi,
Aras 3, Bangunan Hal Ehwal Undang-Undang,
Presint 3, Pusat Pentadbiran Kerajaan Persekutuan,
62692 Wilayah Persekutuan Putrajaya.
(Ruj. Tuan/Puan: LC000352/2013/H)

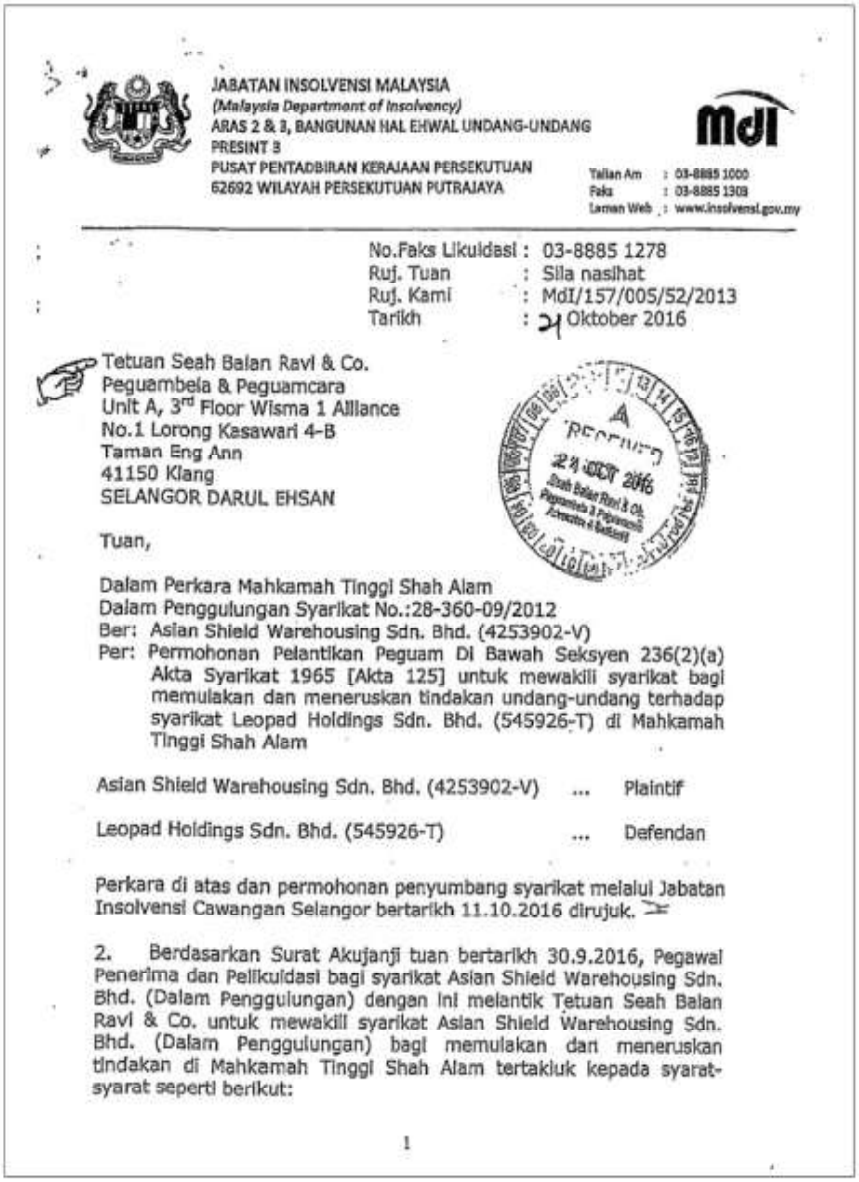
Leopad Holdings Sdn. Bhd.
Wisma Leopad, Tingkat 2,
No.5 Jalan Tun Sambanthan
50470 Kuala Lumpur.

[26] Thus, the appellant re-questioned the *locus standi* of the respondent because Devi, as a bankrupt, wrongly applied for sanction from the DGI without revealing her bankruptcy to appoint solicitors to commence the suit as well as that her subsequent applications for sanctions pursuant to the Insolvency Act 1967 were obtained retrospectively. These sanctions are bad for being contrary to statutory as well as common law. As the result, the suit brought by the respondent is incompetent and must fail *in limine*.

[27] The respondent, in rebuttal, contended that the Federal Court, during the striking out appeal found that the questions predicated on incorrect comprehension of law is academic and need not be answered. Thus, the appeal was dismissed but it was not based on inaccurate and erroneous facts as so asserted by the appellant. According to the respondent, this issue of *locus standi* here is now caught by the doctrine of *res judicata* based on the litigation history of the suit.

[28] That notwithstanding, the respondent also contended that all the sanctions sought by Devi from the DGI were properly and validly obtained.

[29] The undisputed background facts are that since the respondent was wound up in 2013, Devi, who is herself a bankrupt, applied to the DGI on 11 October 2016 as a contributory of the respondent company to appoint Messrs Seah Balan Ravi & Co to bring an action against the appellant in the respondent's name. The sanction was accordingly given *via* the DGI's letter dated 21 October 2016 to Messrs Seah Balan Ravi & Co pursuant to s. 236(2) of the Companies Act 1965. However, the DGI was then un-informed that Devi is an undischarged bankrupt since 6 December 2013. The letter of the DGI is reproduced below:



JABATAN INSOLVENSI MALAYSIA
(Malaysia Department of Insolvency)
ARAS 2 & 3, BANGUNAN HAL EHWAL UNDANG-UNDANG
PRESINT 3
PUSAT PENTADBIRAN KERAJAAN PERSEKUTUAN
62692 WILAYAH PERSEKUTUAN PUTRAJAYA

Talian Am : 03-8885 1000
Faks : 03-8885 1309
Laman Web : www.insolvensi.gov.my

No.Faks Likuidasi : 03-8885 1278
Ruj. Tuan : Sila nasihat
Ruj. Kami : MdI/157/005/52/2013
Tarikh : 21 Oktober 2016

Tetuan Seah Balan Ravi & Co.
Peguambela & Peguamcara
Unit A, 3rd Floor Wisma 1 Alliance
No.1 Lorong Kasawari 4-B
Taman Eng Ann
41150 Klang
SELANGOR DARUL EHSAN

RECEIVED 24 OCT 2016 Tetuan Seah Balan Ravi & Co. Peguambela & Peguamcara Advocates & Solicitors

Tuan,

Dalam Perkara Mahkamah Tinggi Shah Alam
Dalam Penggulungan Syarikat No.:28-360-09/2012
Ber: Asian Shield Warehousing Sdn. Bhd. (4253902-V)
Per: Permohonan Pelantikan Peguam Di Bawah Seksyen 236(2)(a) Akta Syarikat 1965 [Akta 125] untuk mewakili syarikat bagi memulakan dan meneruskan tindakan undang-undang terhadap syarikat Leopad Holdings Sdn. Bhd. (545926-T) di Mahkamah Tinggi Shah Alam

Asian Shield Warehousing Sdn. Bhd. (4253902-V) ... Plaintif

Leopad Holdings Sdn. Bhd. (545926-T) ... Defendan

Perkara di atas dan permohonan penyumbang syarikat melalui Jabatan Insolvensi Cawangan Selangor bertarikh 11.10.2016 dirujuk.

2. Berdasarkan Surat Akujanji tuan bertarikh 30.9.2016, Pegawai Penerima dan Pelikuidasi bagi syarikat Asian Shield Warehousing Sdn. Bhd. (Dalam Penggulungan) dengan ini melantik Tetuan Seah Balan Ravi & Co. untuk mewakili syarikat Asian Shield Warehousing Sdn. Bhd. (Dalam Penggulungan) bagi memulakan dan meneruskan tindakan di Mahkamah Tinggi Shah Alam tertakluk kepada syarat-syarat seperti berikut:

1

(a) Tuan hendaklah mendapatkan seorang penjamin yang kompeten dan penjamin tersebut hendaklah menandatangan Akujanji Penjamin dan Bon Jaminan di pejabat **Jabatan Insolvensi Malaysia Cawangan Selangor** dan mendepositkan sejumlah **RM10,000.00 (Ringgit Malaysia Sepuluh Ribu Sahaja)** dalam bentuk draf bank atas nama Ketua Pengarah Insolvensi. (Tuan hendaklah memastikan wang jaminan tersebut telah dibayar kepada Pegawai Penerima dan Pelikuidasi);

(b) Pegawai Penerima dan Pelikuidasi atau estet syarikat tidak akan bertanggungjawab dan tidak boleh dipertanggungkan sama sekali atas apa-apa kegagalan, kerugian dan apa-apa kos yang terlibat atau yang dikenakan oleh mana-mana pihak yang terlibat dalam guaman dan/atau yang berbangkit daripada guaman tersebut/kos guaman;

(c) Apa-apa kos (sekiranya ada) akan ditanggung sepenuhnya oleh penjamin sebagaimana yang telah dinyatakan dalam Akujanji Penjamin yang bertarikh 4.10.2016;

(d) Peguam yang mengendalikan kes hendaklah memaklumkan kepada Pegawai Penerima dan Pelikuidasi perkembangan kes tersebut dari semasa ke semasa secara bertulis; dan

(e) Sekiranya keputusan Mahkamah dalam tindakan guaman tersebut memihak kepada syarikat, apa-apa wang, pampasan dan faedah yang diterima oleh syarikat hendaklah diserahkan kepada Pegawai Penerima dan Pelikuidasi untuk dimasukkan ke dalam estet syarikat bagi faedah pemiutang-pemiutang.

Sekian, terima kasih.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

(SHAHRUL RIZAL BIN MAJID)
Pengarah
Bahagian Likuidasi
Putrajaya
b.p. Pegawai Penerima dan Pelikuidasi

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s.k.:

Jabatan Insolvensi Malaysia
Cawangan Selangor
Menara MRCB
Tingkat 12,13,13A & 18
No.2 Jalan Majlis 14/10
Seksyen 14
40712 Shah Alam
SELANGOR DARUL EHSAN
(Ruj. Tuan: LC000352/2013)

[Nota: Sila abaikan surat Jabatan ini bertarikh 17.10.2016 berhubung kebenaran pelikuidasi melalui Writ Saman 22NCVC-233-04/2016]

[30] Consequently, Devi commenced the suit in the name and on behalf of the respondent. She later on 22 February 2018, whilst the suit was already progressing mid-way in the High Court, applied for sanction pursuant to s. 38(1)(a) of the Insolvency Act 1967 and obtained on 6 March 2018 retrospective sanction from the DGI to be effective from 21 October 2016. Nonetheless, she again applied for sanction pursuant to s. 38(1)(a) of the Insolvency Act 1967 to the DGI and obtained on 20 June 2018 retrospective sanction from the DGI to be effective from 30 September 2016 instead for the suit.

[31] The relevant law advanced before us are ss. 216(2) and 236 of the Companies Act 1965 and ss. 438 and 486 of the Companies Act 2016 as well as ss. 8(1)(b) and 38(1)(d) of the Insolvency Act 1967. They read as follows:

Companies Act 1965

216. Contributories in the event of death of member

(1) If a contributory dies, either before or after he has been placed on the list of contributories, his personal representatives shall be liable in due course of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly, and if they make default in paying any money ordered to be paid by them proceedings may be taken for administering the estate of the deceased contributory and for compelling payment thereout of the money due.

Contributories in the case of bankruptcy of member

(2) If a contributory becomes bankrupt or assigns his estate for the benefit of his creditors, either before or after he has been placed on the list of contributories:

(a) his trustee shall represent him for all the purposes of the winding up and shall be a contributory accordingly; and

(b) there may be proved against his estate the estimated value of his liability to future calls as well as calls already made.

236. General provisions as to liquidators

(1) The liquidator may with the authority either of the Court or of the committee of inspection:

(a) carry on the business of the company so far as is necessary for the beneficial winding up thereof, but the authority shall not be necessary to so carry on the business during the four weeks next after the date of the winding up order;

(b) subject to section 292 pay any class of creditors in full;

(c) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

(d) compromise any calls and liabilities to calls, debts and liabilities capable of resulting in debts and any claims, present or future, certain or contingent, ascertained or sounding only in damages subsisting or supposed to subsist between the company and a contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as are agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof; and

(e) appoint an advocate to assist him in his duties.

(2) The liquidator may:

(a) bring or defend any action or other legal proceeding in the name and on behalf of the company;

(b) compromise any debt due to the company other than calls and liabilities for calls and other than a debt where the amount claimed by the company to be due to it exceeds one thousand five hundred ringgits;

(c) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels;

(d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary the company's seal;

(e) prove rank and claim in the bankruptcy of any contributory or debtor for any balance against his estate, and receive dividends in the bankruptcy in respect of that balance as a separate debt due from the bankrupt and rateably with the other separate creditors;

(f) draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;

(g) raise on the security of the assets of the company any money requisite;

(h) take out letters of administration of the estate of any deceased contributory or debtor, and do any other act necessary for obtaining payment of any money due from a contributory or debtor or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall for the purposes of enabling the liquidator to take out the letters of administration or recover the money be deemed due to the liquidator himself;

(i) appoint an agent to do any business which the liquidator is unable to do himself; and

(j) do all such other things as are necessary for winding up the affairs of the company and distributing its assets.

(3) The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

Companies Act 2016

438. Contributories in the event of bankruptcy

If a contributory becomes bankrupt or assigns his estate for the benefit of his creditors, either before or after the contributory has been placed on the list of contributories:

(a) his trustee shall represent him for all the purposes of the winding up and shall be a contributory accordingly; and

(b) there may be proved against his estate the estimated value of his liability to future calls as well as calls already made.

…

486. Powers in liquidator in winding up by Court

(1) Where a company is being wound up by the Court, the liquidator may:

(a) without the authority under paragraph (b), exercise any of the general powers specified in Part I of the Twelfth Schedule; and

(b) with the authority of the Court or the committee of inspection, exercise any of the powers specified in Part II of the Twelfth Schedule.

(2) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

Insolvency Act 1967

8. Effect of bankruptcy order

(1) On the making of a bankruptcy order:

(a) except as provided by this Act, no creditor to whom the bankrupt is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose; and

A (b) all the property of the bankrupt shall become divisible among his creditors and shall vest in the Director General of Insolvency and the Director General of Insolvency shall be the receiver, manager, administrator and trustee of all properties of the bankrupt.

38. Duties and disabilities of bankrupts

B (1) Where a bankrupt has not obtained his discharge:

(a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency;

C (b) the bankrupt shall once in every six months render to the Director General of Insolvency an account of all moneys and property which have come to his hands for his own use during the preceding six months, and shall pay and make over to the Director General of Insolvency so much of the same moneys and property as have not been expended in the necessary expenses of maintenance of himself and his family;

D (ba) notwithstanding paragraph (b), the bankrupt shall immediately report to the Director General of Insolvency the receipt of any moneys, property or proceeds in any form from property the value of which exceeds five hundred ringgit and which moneys, property or proceeds do not form part of his usual income and the bankrupt shall, as soon as may be required by the Director General of Insolvency, pay or make over such moneys, property or proceeds to the Director General of Insolvency;

E (bb) the bankrupt shall immediately inform the Director General of Insolvency if there is any change of his home address;

F (c) the bankrupt shall not leave Malaysia without the previous permission of the Director General of Insolvency or of the court;

(d) the bankrupt shall not, except with the previous permission of the Director General of Insolvency or of the court, enter into or carry on any business either alone or in partnership, or become a director of any company or otherwise directly or indirectly take part in the management of any company;

G (e) the bankrupt shall not, except with the previous permission of the Director General of Insolvency or of the court, engage in the management or control of any business carried on by or on behalf of, or be in the employment of, any of the following persons, namely:

H (i) his spouse;

(ii) a lineal ancestor or a lineal descendant of his or a spouse of such ancestor or descendant; or

I (iii) a sibling of his or a spouse of such sibling.

[32] First and foremost, we will deal with *res judicata* raised by the respondent on this issue of *locus standi*. In this respect, we find there is no conclusive finding either way by the Federal Court on the appeal from this court reported in *Leopad Holdings Sdn Bhd v. Asian Shield Warehousing Sdn Bhd & Another Appeal* [2021] 1 CLJ 328 (*supra*) notwithstanding that the appeal was dismissed. It is not clear whether it was an academic appeal or otherwise.

[33] Be that as it may, we also find that the decisions of the High Court reported in *Asian Shield Warehousing Sdn Bhd v. Leopad Holdings Sdn Bhd* [2018] CLJU 1981; [2018] 1 LNS 1981 and of this court (*supra*) that dismissed the appellant's striking out application and appeal respectively are not final and conclusive on the merits because the suit was not struck out; see *Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor* [1999] 1 CLJ 1; [1999] 1 MLJ 193. In other words, this *locus standi* issue has to be re-determined at trial.

[34] Consequently, we find and hold that *res judicata* has not been attracted on this *locus standi* issue.

[35] Next, we noticed that the learned High Court Judge has summarily dismissed this *locus standi* issue as an unpleaded issue in para. [22] of his grounds of judgment (see para. [22] above). This is, in our view, arguably a point of law that need not mandatorily be pleaded and we will accordingly deal with it here.

[36] Upon careful review of the facts, it is plain that Devi as a bankrupt contributory is subject to s. 216(2) of the Companies Act 1965 (now s. 438 of the Companies Act 2016) and s. 38(1)(a) and/or (d) of the Insolvency Act 1967. In *Lai Cheng Ooi v. Naslei Enterprise Sdn Bhd & Anor* [2015] 10 CLJ 409, it was held that the DGI would be the trustee of the bankrupt contributory.

[37] The critical issue here on *locus standi* is whether Devi as a bankrupt contributory has been empowered to commence the suit against the appellant by the wound-up respondent.

[38] In this regard, we firstly find that s. 216(2) of the Companies Act 1965 (now s. 438 of the Companies Act 2016) relied upon by the appellant concerns a matter *in personam* of the bankrupt contributory of needing the DGI to represent the contributory's estate when the contribution of the estate is called upon by creditors in the course of the winding up of the company. This is a red herring and irrelevant to the *locus standi* issue here.

[39] The relevant statutory provisions on the *locus standi* issue, in our view, are instead s. 236(2)(a) of the Companies Act 1965 (now s. 486(1)(a) of the Companies Act 2016) and s. 38(1)(a) and/or (d) of the Insolvency Act 1967. In respect of the former, the liquidator is vested with the power without requiring the authority of the court to bring any legal proceedings in the name

A and on behalf of the wound-up company. Nonetheless, the liquidator may sanction a contributory to bring the legal proceeding; see *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785 ("*Zaitun Marketing*"). As to the latter, the bankrupt contributory shall not, in a representative capacity, maintain a legal proceeding without the previous sanction of the
B liquidator or participate in the management of a company without the previous sanction of the liquidator or the court.

[40] Furthermore, in *Winstech Engineering Sdn Bhd v. ESPL (M) Sdn Bhd* [2014] 2 CLJ 1; [2014] 3 MLJ 1 ("*Winstech Engineering*"), Mohamed Apandi Ali FCJ held as follows pertaining to an application for sanction to apply for
C leave to appeal with emphasis added by us:

> [16] From the submissions and arguments before us, it is clear that in making this application, the respondent is relying on the provisions of the Companies Act 1965, while on the other hand, the applicant is relying on the provision of the Bankruptcy Act 1967. *It is an obvious and undisputed fact*
> D *that the applicant is a corporate person incorporated under the Companies Act. That being so, it is axiomatic that the applicant cannot be a person under the Bankruptcy Act.*
>
> [17] *The applicant did not forward any argument as to why despite it being a corporate body the provision of the Bankruptcy Act is applicable for purposes of the*
> E *pre-requisite sanction before filing any action in court. At the most, the argument was based on analogy. It is our judgment that an analogy argument will have weight if it is based on similar facts and similar legal positions but not otherwise.*
>
> [18] *When a specific law has been enacted pertaining to any power or right relating to legal proceedings, that specific law shall prevail over any other similar laws. It is our judgment that for purposes of this application the relevant law applicable is*
> F *the Companies Act 1965.* (emphasis added)

[41] As the result, if there is a conflict or uncertainty between the Companies Act and the Bankruptcy/Insolvency Act on a statutory provision pertaining to a winding-up matter, the Companies Act prevails.

G **[42]** We are therefore secondly of the view that a contributory may ordinarily seek the sanction of the liquidator pursuant to s. 236 pf the Companies Act 1965 read with *Zaitun Marketing*. However, and since the contributory, Devi, is a bankrupt, she can only act through her trustee in bankruptcy, *ie*, the DGI following the English case of *Re Cape Breton*
H *Company* (1881) 19 Ch D 77, where Jessel MR held as follows:

> He is on the list of contributories, it is true, and must remain there; but that does not give him an interest. When a contributory becomes bankrupt his name is not removed from the list but the 77th section of the Companies Act, 1862 (25 & 26 Vict. C89), provides that the trustees
> I in bankruptcy shall represent him, and shall be deemed to be contributories accordingly. He is no longer in any way interested … The question is one of jurisdiction.

See also *Re Wolverhampton Steel & Iron Co Ltd & Others* (1977) 3 All ER 467.

[43] Thus, for purposes of bringing the suit, it seems that Devi must seek and obtain the previous sanction from the DGI pursuant to s. 38(1)(a) and/or (d) of the Insolvency Act 1967 but the law is unclear if this sanction is additional to that required from an ordinary non-bankrupt contributory. It seems to us unnecessary since s. 236 of the Companies Act 1965 should prevail following *Winstech Engineering*. The failure of a bankrupt to apply for sanction under the Insolvency Act 1967 may, in the circumstances, perhaps only expose the person to penalties prescribed therein.

[44] Nevertheless, it is clear here that Devi had, before the bringing of the suit, applied and obtained the sanction of the DGI as if she is an ordinary contributory. Subsequently, she also twice applied for sanction of the DGI pursuant to s. 38(1)(a) of the Insolvency Act 1967 and was retrospectively granted both of them.

[45] That notwithstanding, the parties have also delved into s. 38(1)(d) of the Insolvency Act 1967 on whether Devi's application constituted an attempt to manage the wound-up respondent company. If Devi's act involves the management of the wound-up company, it is crystal-clear that prior sanction must be obtained from the DGI. In this regard, we find the *dicta* of Ahmadi Asnawi JCA in the striking out appeal reported in *Leopad Holdings Sdn Bhd v. Asian Shield Warehousing Sdn Bhd & Another Appeal* [2021] 1 CLJ 328 cogent with emphasis added by us:

> [55] *But, if she, in her capacity as a contributory, applies to the liquidator, more so the official liquidator (and not to court) per se for sanction for the plaintiff company's proposed civil action, it cannot be said that she is involved, directly or indirectly in the management of the plaintiff company on account, as alluded to earlier, that once a company is wound up the entire board of directors (including a shadow director for that matter) will cease and become functus officio. And, taking the rider of Ormiston J in Bracht's case, supra, the said solitary act of the concerned contributory does not amount to directly or indirectly involved in the management of the plaintiff company.*
>
> [56] The entire management and running of the wound-up company is now in the hands of the liquidator. She (the bankrupt contributory herein) will only be involved if invited to by the liquidator for certain purposes as provided in the CA, 2016 or take part in the public examination under s. 503 of the same. It is beyond imagination to say that such involvement will amount to or will be considered as being directly or indirectly involved in the management of the wound-up company.
>
> [57] It must also be noted that once a company is wound up, its entire business ceases immediately except for the beneficial winding up of the company (see – Part II, 12th Schedule of the CA, 2016). In the present appeal, it is not even raised that the concerned contributory was an employee or acting as an ex-director of the plaintiff's company when she applied for the said sanction for the plaintiff's company.

A [58] The rule restricting the behavior or action or conduct on a bankrupt (disqualifications and disabilities) are meant for the protection of his creditors' interest and those who are dealing with him so as to maintain the commercial morality of his dealings. In this context, it is apposite for us to note briefly the underlying rationale for such disabilities and disqualifications. In *Khoo's Law and Practice of Bankruptcy in Malaysia*, 2nd
B edn it is observed, *inter alia*, at p. 1 the following:

> When a person becomes a bankrupt, he obtains protection from legal proceedings by his creditors subject to certain exceptions. However, he is subject to certain disabilities and disqualifications primarily aimed at preventing him from incurring further debts ...
>
C The objective of the bankruptcy process is that, since the debtor is unable to satisfy all his debts, his assets should be shared fairly and equitably among his creditors ...
>
> In *Tan Wee Hun v. Inchape Equatron (M) Sdn Bhd* [1998] 5 CLJ 769 it is further observed:
>
D The object of the Bankruptcy Act is to protect the public from irresponsible businessmen who transact business when they know they do not have the financial capacity to meet their payment obligations.

E [59] Hence, amongst others, a bankrupt is disqualified of being appointed as a company director, and to cease to be a director once declared a bankrupt. To carry on as a director or to directly or indirectly, be concerned with or takes part in the management of the company is an offence under s. 198, of the CA, 2016 (see – *Asia Commercial Finance (M) Bhd v. Pasadena Properties Development & Ors* [1990] 2 CLJ 961; [1990] 1 CLJ
F (Rep) 606).

[60] The above-mentioned activities presuppose that the company the concerned contributory is said to have directly or indirectly taken part in its management must of necessity be a going concern or a solvent company. Here is where *Commissioner for Corporate Affairs v. Bracht* (*supra*) is directly on point. The case is pointedly all about a going concern
G company or a solvent company. So too in all the cases cited by the defendant where the act of the bankrupt was questioned and impugned.

[61] *We would reiterate that even though the concerned contributory is undisputedly an undischarged bankrupt, reading s. 38(1)(d) in the context of its setting, inter alia Part II of the BA/SA, 1967, the company in which the concerned contributory is*
H *said to be directly or indirectly concerned in or take part in its management must refer to a going concern or a solvent company. Hence, the status of the plaintiff's company as a wound-up company is material and having serious determinative implication on the issue raised by the defendant. It is worth repeating that once a company is wound up, the management, ie, the entire board of directors, is functus officio, and the same being taken over by the liquidator. Henceforth, the winding-up*
I *company is prohibited from carrying out any business except for the beneficial winding up of the company.*

[62] *Thus, there is no basis to sustain the defendant's contention that the concerned contributory has no locus to apply for sanction for the plaintiff's company. Further, it must be noted that the concerned contributory is not affirming an affidavit nor holding herself out as a director or officer of the company in any affidavit or cause papers to support the plaintiff company's action in court. Thus, the cases cited by learned counsel for the appellant are readily distinguishable.*

[63] In the light of the circumstances under which the said sanction was applied by the concerned contributory, the view of the learned trial judge as expounded in para. 10 of his grounds of judgment (at p. 23, RRT) is entirely correct. *There is no issue that the contributory has no competency to apply for the said sanction. She has the competency and she does not have to obtain the prior sanction of the DGI or previous sanction of the DGI. On the facts and law, she had passed the legal threshold to procure the said sanction. The action was proceeded upon a valid sanction.* (emphasis added)

[46] We agree with the views of this court therein which suggest that sanction of the DGI by reason of Devi's bankruptcy is not even necessary because the acts of instructing a solicitor and bringing an action of debt recovery by Devi is consistent with winding up that did not constitute management of the wound-up company. It was not to condone Devi entering into business on behalf of the wound-up company as cautioned in *Foo Fatt Chuen v. Jacobson Cheong Weng Hin & Ors* [2012] 3 CLJ 632. Accordingly, the retrospective sanctions sought by Devi pursuant to s. 38(1) of the Insolvency Act 1967 can be treated as done *abundans cautela*.

[47] In the premises, we objectively find and hold thirdly that the sanction which was originally sought by Devi and obtained from the DGI dated 21 October 2016 suffices notwithstanding it was not so stated in the application for purposes of s. 38(1)(a) or (d) of the Insolvency Act 1967; hence, the DGI might have been unaware of Devi's bankruptcy. These omissions are also in our view not of material significance and consequence because it is the same liquidator, *ie*, the DGI, who was the person who gave the sanction. Moreover, we find that the wide safeguard conditions already imposed by the DGI on the giving of the original sanction on 21 October 2016 are adequate to account for Devi's bankruptcy at that material time.

[48] We are fourthly therefore of the view that it is unnecessary for Devi to make an application to seek sanction of the DGI to bring an action pursuant to s. 236 of the Companies Act 1965 read with *Zaitun Marketing* coupled with another application pursuant to s. 38(1)(a) and/or (d) of the Insolvency Act 1967. The sanction obtained on 21 October 2016 which has undoubtedly been obtained prior to the commencement of the suit suffices. Consequently, the other two retrospective sanctions obtained by her are surplusages and did not matter that they were not prior or previous sanctions. It follows that the cases of *Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* [2012] 10 CLJ 88, *Akira Sales & Services (M) Sdn Bhd*

v. Nadiah Zee Abdullah & Another Appeal [2018] 2 CLJ 513; [2018] 2 MLJ 537 and *Lai King Lung & Anor v. Merais Sdn Bhd* [2020] 9 CLJ 449 on invalidity of subsequent/retrospective sanctions are hence immaterial. We are mindful of the case of *Small Medium Enterprise Development Bank Malaysia Bhd v. Oren Venture Sdn Bhd & Ors And Another Case* [2022] 6 CLJ 148; [2022] 12 MLJ 247 which has been recently affirmed by this court, but we find that the case is distinguishable because it concerned delegation of the liquidator's power which is not in issue herein.

[49] In the premises, we find and hold that the respondent has *locus standi* to bring and maintain the suit. In other words, the suit has not been incompetently brought contrary to that advanced by the appellant.

Substantive Merits

[50] The appellant principally contended before us that the learned High Court Judge fell into error by having failed to consider that the agreement subsisted until it was terminated. According to the appellant, the agreement was only terminated upon the commencement of the suit. Prior thereto, the agreement remained in force and binding on the parties. Thus, the appellant was not obliged to pay the respondent rental for the property.

[51] However, the respondent cross-contended that the appellant must pay rental for the property upon the service of the respondent's solicitor's letter dated 12 September 2012.

[52] We see in paras. (6), (9) and (30) of the learned High Court Judge's grounds of decision (see para. [22] above) that His Lordship accepted the respondent's contention.

[53] The law on appellate intervention, particularly to vary a trial decision, has been set out in *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] CLJU 1416; [2012] 1 LNS 1416 wherein Abdul Wahab Patail JCA held as follows with emphasis added by us:

> [4] Both parties began their submissions with the clear understanding that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts in the trial judge. They cited this court in *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545 CA; [1995] 3 MLJ 395 CA. This general principle was adopted by this court in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 and other cases. It is clear it is a general principle and that there are exceptions when appellate intervention is necessary to ensure justice is done. In the cases regularly cited, the terms "intervene" and "interfere" are used interchangeably. A more precise use of terminology would remove much unnecessary confusion and argument. It is more precise to say that an appellate court will intervene to correct an injustice when it is shown to have occurred in the trial court, but it would be an interference otherwise.

…

[7] There is almost no limit to the range within which cases in court may vary. At one end there are cases that involve solely questions of law, and no facts are disputed. On the other there are cases that involve no law but all the facts are disputed. Within these cases there may be cases with disputed facts that involve solely interpretation and inferences leading to a conclusion on a finding on the disputed fact, and there may be other cases with disputed facts that involve solely oral evidence and the finding depends entirely upon an assessment of the credibility of witnesses who testified and were tested before the trial judge.

[8] *Hence, the proper approach is that if (a) it is shown that the judgment cannot be explained or justified by the special advantage enjoyed by the trial judge by reason of having seen and heard the witnesses testify and being tested before him, and (b) an injustice is demonstrated to have been occasioned by any error by the trial judge,* for example:

(a) the judgment is based upon a wrong premise of fact or of law;

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course or events affirmed by the trial judge could not have occurred;

(e) *the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts;* or

(f) *the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion;*

an appellate court will intervene to rectify that error so that injustice is not occasioned.
(emphasis added)

[54] Furthermore, in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309, Steve Shim CJ (Sabah and Sarawak) held as follows with emphasis added by us:

In gist, the pivotal question raised by the appellants was whether the term "insufficient judicial appreciation of the evidence" used by the Court of Appeal constituted a new test for appellate intervention. We think it is important to examine this proposition in the light of what the Court of Appeal had said in its judgment beginning from para. 27 which we have reproduced earlier but repeated herein for the purpose of emphasis. It states:

A

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think, appropriate that we say what judicial appreciation of evidence involves.

B

And the Court of Appeal went on to explain in para. 28 as follows:

> *A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria.* He must also test the evidence of a particular witness against the probabilities of the case.

C

In making the observations above, the Court of Appeal cited the following cases: *Tindok Besar Estate Sdn Bhd v. Tinjar Co.* [1979] 1 LNS 119; [1979] 2 MLJ 229; *Muniandy & Ors. v. Public Prosecutor* [1966] 1 LNS 110; [1966] 1 MLJ 257; *Dr. Shanmuganathan v. Periasamy s/o Sithambaram Pillai* [1997] 2 CLJ 153, *Yusoff bin Kassim v. Public Prosecutor* [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376; *Rex v. Low Toh Cheng* [1941] MLJ 1; *Tengku Mahmood v. Public Prosecutor* [1974] 1 LNS 176; [1974] 1 MLJ 110; *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 1 LNS 40; [1984] 2 MLJ 165; *Armagas Ltd v. Mundogas SA ("The Ocean Frost")* [1985] 1 L1 R 1; *State of Rajasthan v. Hanuman* (AIR) [2001] SC 282, 284; *Tek Chand v. Dile Ram* (AIR) [2001] SC 905.

D

E

In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase "insufficient judicial appreciation of evidence" merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

F

G

H

In the circumstances and for the reasons stated, there is no merit in the appellants' contention that the Court of Appeal had adopted a new test for appellate intervention. In our view, what the Court of Appeal had done was merely to accentuate the established plainly wrong test consistently applied by the appellate courts in this country.

(emphasis added)

I

[55] From our review and analysis of the facts chronologically, there is no doubt that there was an agreement made between the parties. It is a binding preliminary contract pending the execution of the sale and purchase agreement of the land.

[56] It is also plain from the agreement that the appellant is entitled to the occupation of the property rent-free throughout the subsistence of the agreement.

[57] However, it became obvious in 2011 that the respondent was unable to fulfil the agreement due to its inability to procure the larger plot of the land from PNSB to be sold to the appellant under the agreement. There were attempts made between the parties to vary the agreement but to no fruition.

[58] Thus, the respondent finally, on 12 September 2012, *via* its solicitors, served its notice on the appellant requiring payment of rental for the property.

[59] From our construction of the aforesaid letter, we find, for all intents and purposes, that termination of the agreement was contemplated. The respondent demanded from the appellant for payment of rental of the property to be calculated retrospectively from April 2012 which would not have been payable had the agreement subsisted. It is also plain that the respondent has by that time disabled itself from completing the agreement through the execution of a sale and purchase agreement for the complete sale of 10.2 acres of the land. Consequently, we noted that the agreement was meant to be terminated on 12 September 2012 by the respondent.

[60] The law on termination of contracts in analogous circumstances here of disability of performance has been succinctly encapsulated in the *dicta* of Augustine Paul FCJ in *Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd* [2007] 6 CLJ 93; [2007] 5 MLJ 697 as follows with emphasis added by us:

> [30] … In commenting on the circumstances in which a person may disable himself from performing his promise within the meaning of s. 39 of the Indian Contracts Act (equivalent to our s. 40) *Indian Contract and Specific Relief Acts* by Pollock & Mulla, 11th edn, vol 1 says at p 532:
>
> > The principle that in the absence of an express provision in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach (*Alghussein Establishment v. Eton College* [1991] 1 All ER 267.

> It is very old law that if a promisor disables himself from performance, even before the time for performance has arrived, it is equivalent to a breach …
>
> …
>
> [31] … *The relevant words in s. 40, that is to say, "... disabled himself from performing his promise ..." do not subject the rule to such a qualification. The words are wide enough to include any act on the part of a party which has the effect of bringing the contract to an end.* There can be no dispute that the defendant terminated the services of the plaintiff because its new majority shareholder wanted to appoint its own architect. The use of the new plans resulting in the project being aborted, even if considered to be a reason, is on the same footing. This state of affairs was brought about by the act of the defendant itself thereby disabling it from performing its part of the agreement. The defendant cannot disable itself from performing a contract brought about by its own acts. The reason for the termination of the services of the plaintiff by the defendant is thus not valid. There is therefore a constructive breach of contract by the defendant. What now remains to be considered is the measure of damages to which the plaintiff is entitled.
>
> [32] *Where a party by his own act makes it impossible for him to perform his contract at the due date, there is a constructive breach of contract, and the other party is entitled forthwith to enforce his rights as on a breach* (see *Synge v. Synge* [1894] 1 QB 466; *Saranpet v. Punno* [1931] 134 IC 779). The measure of damages following a breach of contract is governed by s. 74 of the Contracts Act 1950 ("s. 74") … (emphasis added)

[61] However, the appellant, instead of accepting the constructive repudiatory breach by the respondent and discharge the agreement, unilaterally chose to affirm and treat the agreement as still subsisting and continued to occupy the property without paying rent. As a matter of law, the appellant in so doing retained its right to sue the respondent for damages following *Harbutt's Plasticine Ltd v. Wayne Tank And Pump Co Ltd* [1970] 1 QB 447.

[62] The respondent however did not refund the initial deposit paid by the appellant. Furthermore, the respondent did not unequivocally reject the appellant's affirmation by seeking vacant possession of the property forthwith.

[63] Finally, the respondent broke the impasse by commencing the suit in 2016, primarily to seek vacant possession of the property as well as claimed for unjust enrichment on the part of the appellant in not paying rental for the property as demanded by the respondent. These remedies, amongst others, were allowed by the learned High Court Judge.

[64] The appellant in turn, counterclaimed damages in the suit against the respondent for breach of the agreement based on the facts as pleaded but that was dismissed by the learned High Court Judge as unproved.

[65] In the premises, we find that the agreement was only terminated forthwith upon the commencement of the suit on 1 November 2016 following *Tan Hock Chan v. Kho Teck Seng* [1979] CLJU 110; [1979] 1 LNS 110; [1980] 1 MLJ 308.

[66] In respect of prayer (i) of the respondent's claim for vacant possession, the learned High Court Judge allowed it for the 4 acres portion of the land. We find no appealable error there and this does not appear to be disputed by the appellant.

[67] Next as to prayer (ii) of the respondent's claim for rental of the property, the learned High Court Judge allowed rent of RM120,000/month from April 2012 to December 2016 and thereafter RM165,000/month from January 2017 until vacant possession of the 4 acres portion of the land is delivered up to the respondent based on unjust enrichment that benefitted the appellant.

[68] Before us, it is plain that the appellant did not dispute that rental for the property is payable after the agreement is terminated, save that the termination only took place upon the commencement of the suit.

[69] Based on our finding in para. [65] above, we find that the payment of rent for the property should commence from 1 November 2016 instead of April 2012 as ordered by the learned High Court Judge. In either case, we are also satisfied that the respondent has on the facts here satisfactorily met the tenets of unjust enrichment set out in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441. Put simply, the appellant has since the termination of the agreement been enriched by the occupation of the property at the expense of the respondent without payment of rent and there is no defence thereto. We are mindful of the appellant's counterclaim for damages due to the respondent's wrongful repudiation of the agreement but we find that is an independent cross-claim which will be dealt separately as a matter of accounting rather than a defence to extinguish liability to make restitution.

[70] Consequently, we find that the appellant is liable to pay rent for the 4 acres portion of the land including the property situated thereon from 1 November 2016 till vacant possession is delivered.

[71] As for the quantum of rent payable, we noticed that both parties produced expert witnesses on property valuation to opine on the fair rent payable for the property. The respondent relied on Hoa Chee Guan of Mohd Nor & Partners, who assessed the rent at RM127,490/month as on 1 March

2010 and between RM164,346/month to RM190,984/month as at end 2017 whereas the appellant relied on Anthony Chua of KGV International Property Consultants who assessed the rent at RM87,000/month for 2010 compounding to RM108,000/month for 2018. The learned High Court Judge did not accept either of the rent assessed by the parties' respective expert witnesses but adopted a fair rent prorated therefrom.

[72] We are of the view that the approach adopted by the learned High Court Judge is arbitrary and hence, warrants appellate intervention here.

[73] Next, the learned High Court Judge dismissed prayer (iii) of the respondent's claim for double rent but this is irrelevant here because there is no separate appeal on this by the respondent.

[74] Moving on, the learned High Court Judge made no order on prayer (iv) of the respondent's claim for damages but this is again irrelevant here because there is no separate appeal on this by the respondent too.

[75] In respect of prayer (v) of the respondent's claim for quit rent, assessment, utilities and other charges on the land ("charges"), the learned High Court Judge allowed the same to be paid by the appellant from 1 March 2010 until vacant possession has been delivered. Upon our perusal of the agreement, it seems that these charges are payable by the appellant in consideration of the appellant utilising the property fee of rent throughout the subsistence of the agreement. This would not be the case upon termination of the agreement. Consequently, we find that the learned High Court Judge erred when he ordered that these charges be still paid by the appellant after the termination of the agreement and appellate intervention is justified as well.

[76] As to prayer (vi) of the respondent's claim for contra of the initial deposit paid by the appellant against the respondent's claims, this has been allowed by the learned High Court Judge. Upon our review, this is correct as a matter of accounting alluded to in para. [69] above. Thus, there is no appealable error here that warrants intervention.

[77] With regard to prayers (vii) and (viii) of the respondent's claim on removal of private caveat entered on the land by the appellant as well as prevention of further entry of private caveat by the appellant respectively which have been allowed by the learned High Court Judge, we noticed that the caveat was still in subsistence at the material time of the filing of the suit. Hence upon review, we find that there is no appealable error on the part of the learned High Court Judge. It is immaterial if the caveat lapsed during the course of the trial of the suit. Furthermore, there is no prejudice that the appellant be prevented from further entry of the private caveat since the agreement has been terminated and the appellant has no longer any caveatable interest in the land.

[78] As for the counterclaim of the appellant for loss of use of the 6.2 acres of the land that has been dismissed, we find that the learned High Court Judge concluded that this has not been proved. Since we have found in paras. [59] to [61] above that the respondent has terminated the agreement on 1 November 2016 due to its own disability to honour it in its entirety that included the 6.2 acres portion of the land was a constructive repudiatory breach of contract, the appellant is entitled to damages as proved.

[79] We however concur with the learned High Court Judge that the appellant failed to do so by only having its director Dato' Loganathan a/l Ramamirtham making the following bald assertion at trial:

> As a result of the Plaintiff's breach in resolving the matter whereby the Defendant was supposed to have been able to use the entire 10.25 acres, we have incurred losses amounting to approximately RM250,000.00 a month as opportunity loss since we have not been able to utilise the remaining 6.25 acres.

[80] The is no documentary evidence adduced by the appellant to substantiate that estimated loss which would normally be expected and available in such commercial undertakings; see *Oakwell Engineering International Pte Ltd v. PCM Feam (M) Sdn Bhd* [2014] CLJU 511; [2014] 1 LNS 511; [2014] 11 MLJ 175.

[81] In the premises, we find no appealable error that warrants appellate intervention.

Conclusion

[82] For the foregoing reasons, particularly in paras. [72] and [75] above, we partly allow the appellant's appeal by varying the High Court judgment and order as follows:

(i) the date April 2012 in prayers (ii) and (viii) of the judgment is substituted to 1 November 2016;

(ii) furthermore, the rent of RM120,000 and RM165,000 in prayers (ii) and (iii) of the judgment is set aside and the compensable rent by the appellant to the respondent be reassessed by the High Court with the assistance of a sole court appointed expert valuer to be agreed by the parties, otherwise appointed by the President of the Royal Institution of Surveyors Malaysia, whose fees shall be jointly paid by the parties;

(iii) the charges in prayer (iv) of the judgment is substituted from 1 March 2010 to 1 November 2016 only to be reassessed by the High Court; and

(iv) the parties shall bear their own costs here including for the reassessment to be conducted pursuant to (ii) and (iii) above.

[83] For the avoidance of doubt, the rest of the unvaried part of the High Court judgment and order stands enforceable.